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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,
versus
UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

OPINION BELOW

The opinion of the district court (App. A, *infra*, at 1-45) is reported at 449 F. Supp. 449.

JURISDICTION

The judgment and order of the three-judge district court, holding unconstitutional in its entirety and enjoining enforcement of the Arizona Agricultural Employment Relations Act, Ariz. Rev. Stat. Ann. § § 23-1381 through 23-1395 (Supp. 1970), was entered on

April 20, 1978 (App. B, *infra*, at 1-2). A notice of appeal to this Court was filed on June 13, 1978 (App. C, *infra*, at 1-3). Jurisdiction is conferred on this Court by 28 U.S.C. § 1253 (1970).

QUESTIONS PRESENTED

1. Whether an Article III case or controversy is presented by a lawsuit challenging in its entirety a comprehensive agricultural labor regulatory statute, where the lawsuit was filed prior to the appointment of the Agricultural Employment Relations Board and prior to adoption of any regulations; where not one of the five statutory provisions held constitutionally defective has ever been applied to any of the plaintiffs; and where the record consists almost entirely of widely differing speculation concerning how the statute might be applied.

2. Most of the district court's constitutional rulings depend upon its interpretations of the state statute that it invalidated. In each instance, the court chose the interpretation that raised, rather than avoided, the constitutional questions. The second question presented is whether under these circumstances the district court had an obligation either to abstain or to adopt that version of state law that would save the statute rather than invalidate it.

3. Whether the election procedures provided by Arizona's Agricultural Employment Relations Act can be held to violate the right of freedom of assembly, on the basis of assumed but unproven delays in holding elections, where the challenged procedures are virtually identical to those of the National Labor Relations Act (NLRA), and where the asserted reason for the significance of delay — peak employment seasons of short

duration — is equally applicable to an important segment of NLRA coverage.

4. Whether a state labor statute's extension of the proviso in § 8(b)(4)(ii)(B) of the NLRA, which permits truthful secondary consumer pressures, to a prohibition against untruthful, dishonest and deceptive secondary consumer pressures renders it unconstitutional.

5. Whether under this Court's holdings in *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956), *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), and others, federal courts are to determine issues of union access to employers' property by taking into account all relevant considerations, including the availability of other means of communication, or whether the issue may be decided without regard to the facts of the particular case.

6. Whether for the first time in history the Seventh Amendment should be held binding on the states, and if so, whether compulsory arbitration in the narrow circumstances of Section 1393 B of the Arizona Agricultural Employment Relations Act violates the Seventh Amendment or substantive due process.

7. Whether the district court's determination that all or parts of four out of fifteen sections of Arizona's Agricultural Employment Relations Act (and one out of twenty unfair labor practices) were unconstitutional, justified its invalidation of the entire Act, when most of the remaining provisions are functionally separate and independent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Seventh Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution provide in pertinent part:

> *First Amendment.* Congress shall make no law . . . abridging the freedom of speech . . . or of the right of the people peaceably to assemble . . . .
>
> *Seventh Amendment.* In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
>
> *Fourteenth Amendment.* No State shall . . . deprive any person of life, liberty, or property, without due process of law.

The full text of Arizona's Agricultural Employment Relations Act is set forth at App. D, *infra*, at 1-36.

STATEMENT OF THE CASE

The National Labor Relations Act excludes agricultural laborers from its coverage.[1] During its 1971 session, the Arizona Legislature first attempted to deal with the serious problems resulting from the absence of a labor law protecting an important segment of the State's work force. Because there was no governmentally controlled and supervised procedure for workers to choose their bargaining representative, representation questions were settled as a matter of economic might, rather than free choice. The Legislature was unable to provide a solution in 1971.

[1] Section 2 (3), 29 U.S.C. § 152 (3) (1970).

In May of 1972, following extensive hearings and debates in which the views of all interested parties were considered, the Legislature enacted the Agricultural Employment Relations Act (AERA). It is a comprehensive labor statute, modeled after the NLRA in its overall structure and operation, but tailored in many respects to the peculiar conditions of agricultural labor. The Act defines persons and activities subject to its coverage,[2] specifies and prohibits unfair labor practices by employers[3] and unions,[4] and defines the obligation of each to engage in collective bargaining.[5] It provides procedures for secret ballot elections virtually identical to those of the NLRA.[6] It also establishes an agricultural employment relations board (Board),[7] and gives it power to hold hearings,[8] conduct elections and certify the results,[9] issue cease and desist orders,[10] order reinstatement and back pay,[11] supervise elections,[12] prohibit unfair labor practices,[13] and generally to implement the statute.

[2] Ariz. Rev. Stat. Ann. § 23-1382 (Supp. 1977).

[3] *Id.* at § 23-1385 A.

[4] *Id.* at § 23-1385 B.

[5] *Id.* at § 23-1385 D and E.

[6] *Id.* at § 23-1389.

[7] *Id.* at § 23-1386.

[8] *Id.* at § 23-1387 C and § 23-1390.

[9] *Id.*

[10] *Id.* at § 23-1390 C.

[11] *Id.*

[12] *Id.* at § 23-1389.

[13] *Id.* at § 23-1390.

The complaint in this case,[14] challenging the statute on numerous constitutional grounds, was filed about three months after the statute had been signed into law. At that time, there were no regulations, the Board had not been appointed, and there had been no enforcement of the law. Subsequently, the Board was appointed, regulations were adopted, and there has been some enforcement. Just prior to the trial of this case, in January of 1977, the parties entered into a Stipulated Statement of Status of Past and Pending Actions Taken in Accordance with the Agricultural Employment Relations Act (enforcement stipulation) describing the twenty instances in which there had

[14] The lower court's opinion describes the parties: "Plaintiffs in this action are the United Farm Workers National Union (U.F.W.), on behalf of itself and its members; Gustavo Gutierrez, an agent of the U.F.W. in the State of Arizona; Ruben Alaniz and Matilda Varela, farm workers, on behalf of themselves and all other farm workers; and Wendy Rose, an individual supporter of the U.F.W., on behalf of herself and all other similarly situated U.F.W. supporters.

Defendants are Bruce Babbitt, Governor of the State of Arizona; Jack La Sotta, [sic] Acting Attorney General; Bert [sic] Fleming, Treasurer; Raymond Long, Finance Commissioner; Gene Blake, William S. Boice, Jack Montgomery, Keith Walton, Jack McManus, Milton G. Sanders, individually and as members of the Arizona Agricultural Relations Board; and Theresa Bond, in her capacity as Executive Secretary of the Board." App. A at 2.

In addition, the Arizona Farm Bureau Federation, an Arizona corporation, the Arizona Grape Growers' Association, an Arizona corporation, the Vegetable Growers' Association, an Arizona corporation, and the Yuma Citrus Shippers' Association, an unincorporated association, were permitted to intervene as defendants. *Id.*

The district court did not determine this case to be a class action.

been some kind of enforcement of the Act. None of those twenty is involved in this litigation. Moreover, as described more fully below, none of them involved application to any of these plaintiffs of any statutory provision held unconstitutional by the district court.

The trial was held before a three-judge district court. Most of the evidence presented at the trial consisted of the expression of views concerning some results that might be expected under certain provisions of the Act if and when they were actually applied.[15] This testimony necessarily rested on two assumptions:

> 1. The interpretation that the Arizona courts would place on several key provisions whose meaning was, and still is, in dispute.[16]
>
> 2. The effect of those provisions — once interpreted by the Arizona courts and applied by the Board — on agricultural employment conditions and relationships in Arizona.[17]

[15] The witnesses were Mr. Cesar Chavez, President of the Plaintiff United Farm Workers Union, two labor lawyers, one offered by each side, an agricultural field supervisor, and an agricultural economist.

[16] Concerning access to the employer's property, for example, one of the issues on this appeal, Mr. Chavez acknowledged that "whether it [access] is denied or not is a matter of legal interpretation." Reporter's Transcript (Tr.) 182. Mr. Chavez repeatedly stated that adverse effects from the statute were based on assumptions concerning how it would be interpreted. See, *e.g.*, Tr. 162-63, 164, 182-84, 211.

[17] Some of Mr. Chavez' views were based on interpretations of the law given by his attorneys. See, *e.g.*, Tr. 259. Referring to a particular provision dealing with management rights Mr. Chavez stated: "I don't know what it means but if it means what I think it to mean, then it would have a very bad effect on the Union." Tr. 182.

It is not surprising that the "expert opinions" built on such a combination of speculations varied greatly. Regarding the question considered most important by the district court — the minimum time that would expire between the filing of the election petition and the holding of an election — the defendant's "expert" concluded that the period could be as short as eight days. "Experts" for the plaintiffs concluded that it would be much longer.

The plaintiffs attempted to blunt the obvious case or controversy problems resulting from their attempt to have a federal court pass on the constitutionality of statutory provisions in the absence of actual application of any of these provisions in the action before the court, by pointing to the enforcement stipulation. The twenty cases covered by that stipulation fall into three categories:

1. Eight of the cases, numbers 1, 2, 3, 7, 11, 12, 13, and 20 were attempts to prevent allegedly illegal secondary boycotts. The defendant, or the party charged, in each of these cases was the appelle U.F.W. However, none of the cases involved the interpretation or enforcement of § 1385 B 8, [18] the only secondary boycott provision of the Act held unconstitutional by the district court.

2. Six of the cases, numbers 4, 5, 6, 8, 9, and 10, involved election procedures. None of the plaintiffs in this case was involved in any of those elections. In none of the six cases was there an assertion that delay created any problems.

[18] This provision deals with secondary consumer pressures "by the use of dishonest, untruthful and deceptive publicity."

3. The remaining six cases, numbers 14, 15, 16, 17, 18, and 19, all involved unfair labor practice proceedings against employers under § 1385 A.

Thus, of the five statutory provisions found constitutionally defective by the lower court (discussed below) the only one involved in any of the enforcement proceedings was § 1389, which deals with elections.[19] Not one of these plaintiffs was involved in any way in any of those elections or any other election under the statute that they challenge. In none of the six election cases covered by the stipulation was there any allegation of unfairness because of delays.

Before the district court, the appellees' principal emphasis with regard to the enforcement stipulation was that in three of the secondary boycott cases, temporary restraining orders had been issued against them without notice or hearing. The district court did not deal with the constitutional sufficiency of any of these *ex parte* temporary restraining orders. Moreover, the notice requirements for a temporary restraining order depend on the facts of the particular case. *Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175 (1968). If there are constitutional defects in any temporary restraining order proceedings under the Act, the challenge should be raised in those proceedings.

[19] In case number 2, the Safeway boycott case, Safeway alleged violation of the provision dealing with dishonest, untruthful and deceptive publicity (Ariz. Rev. Stat. Ann. § 23-1385 B 8 (Supp. 1977)), but that part of the statute was neither interpreted nor enforced in that case. The only reference to it was the Arizona trial court's statement, "The Court concludes that the Union's publicity is a sufficient compliance with Subsection 8." (Enforcement Stipulation, Exhibit 2A, at 7).

Totally lacking from this case, therefore, is the Article III requirement that questions come into federal court only after they have been sharpened by actual disputes between the parties to the litigation.

By the time the briefs were filed following the trial, the plaintiffs had reduced to nine their challenges to various parts of the Act.[20] The Court held three parts of the statute unconstitutional on their face, and invalidated two others in light of testimony at the trial concerning how the Act might function. Most of the court's holdings also rested on assumptions as to how the Arizona courts might interpret the relevant provisions. The sections held invalid on their face were:

1. Section 1385 B 8, prohibiting secondary consumer pressures "by the use of dishonest, untruthful and deceptive publicity."

2. Section 1392, which provides criminal penalties for violations of the Act.

[20] In the words of the district court: "In particular, plaintiffs' agruments deal with nine separate issues and at least as many provisions of the AERA in support of their contention that the AERA is unconstitutional. Those issues and the statutory provisions dealt with are: (1) A.R.S. § 23-1385(B)(6) and (7) [generally dealing with secondary boycotts as an unfair labor practice]; (2) A.R.S. § 23-1385(B)(8) [publicity directed at the ultimate consumer regarding nonuse of agricultural product as an unfair labor practice]; (3) A.R.S. § 23-1385(B)(12) [recognitional picketing as an unfair labor practice]; (4) A.R.S. § 23-1389 [employee representation and election procedures]; (5) A.R.S. § 23-1385(C) [access by union to workers on employer property]; (6) A.R.S. § 23-1382 (1) [exclusion of stitchers and haulers and others from AERA]; (7) A.R.S. §§ 23-1384, 23-1385(B)(11), 23-1385(D) [elimination of "management rights" from bargaining process]; (8) A.R.S. §§ 23-1385(B)(13), 23-1393(B) [restriction and prohibition against striking and picketing]; and finally, (9) A.R.S. § 23-1392 [criminal penalties for violation of the Act]." App. A at 3.

3. Section 1393 B, requiring that any employer who seeks a ten-day restraining order against a strike during harvest must, as a condition, agree to submit the dispute to binding arbitration.

The provisions held unconstitutional in light of the evidence were:

1. That part of Section 1385 C which provides that neither an employer nor a labor organization shall be required to make available to the other "materials, information, time or facilities" for the purpose of communicating with employees.

2. All of Section 1389, dealing with representation and elections.

Judge Craig wrote a separate opinion styled a concurrence, taking the position that the court should have abstained, "in order that the Supreme Court of Arizona might first express its opinion with respect to the constitutionality of a law established by the Arizona State Legislature." (App. A at 45).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. *The Present Dispute Is not a Case or Controversy, and the District Court Should Have Dismissed It.*

Central to Article III's case or controversy requirement is the well-established principle that federal courts have jurisdiction to decide only those issues

that are necessary to the resolution of actual, concrete controversies.[21]

That principle was not followed by the district court. This case is wholly hypothetical. There are no specific pertinent facts, no application of provisions of the statute to these plaintiffs, no specific farm worker pointing to facts on the record demonstrating how his constitutional rights have been affected by the application of the statute to those specific facts.

The "record" consists almost entirely of widely varying expressions of opinion concerning what kinds of results might be expected from application of different provisions of the statute. It is not surprising that the views of the experts varied. The main evidentiary issue at the trial, and the most important factual element in the lower court's decision, concerned how long it might take to hold elections under the Arizona Act. There were no actual facts on that issue, because the court was not dealing with any particular election. The expert opinion concerning how long it might take varied from slightly over a week to a much longer, though

[21] In *Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947), the Court stated the well-known rule of necessity as follows: "[C]onstitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided."

unspecified, period. The court adopted the view of the evidence that in its opinion rendered the statute unconstitutional.

Armed with that kind of record the court proceeded to wade through a catalogue of objections to numerous sections of the statute. It found five parts, including two sections and parts of two others unconstitutional. The court then declared that the entire statute — including parts whose operation and purpose have no conceivable dependence on the sections invalidated — must fall.

This, we submit, is not case or controversy adjudication. Indeed, it is very close to the Council of Revision approach rejected by the constitutional convention, an approach under which newly enacted statutes would have been reviewed for constitutionality prior to their operation by a panel composed in part of judges.[22]

We know of no case — and in the six years of this litigation the appellees have discovered none — in which this Court has approved the wholesale consideration of the constitutionality of a comprehensive regulatory statute, each of whose challenged provisions

[22] The eighth resolution in the Virginia Plan proposed to the constitutional convention of 1787 provided in pertinent part "that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again Negatived by an _____ [blank left in original] of the members of each branch." I Farrand, *The Records of the Federal Convention of 1787*, 21 (1966).

raises separate constitutional issues, in advance of, and in the absence of, the application of those provisions. The approach to that kind of statute has always been to consider the individual provisions as each is involved in concrete factual settings raising the constitutional issues of which the plaintiffs complain.

In two cases the Court has considered challenges to comprehensive labor regulatory statutes apart from the enforcement of specific provisions. *A.F.L. v. Watson*, 327 U.S. 582 (1946), and *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). In both cases the Court refused to entertain the broadside attack. Other decisions outside the labor field substantiating the principle that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws"[23] include *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 147 (1974), and *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 56-57 (1974). Even in the absence of a comprehensive statute, this Court has "often declined to decide important questions regarding the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case." *Kleppe v. New Mexico*, 426 U.S. 529, 547 (1976) (quoting *Longshoremen v. Boyd*, 347 U.S. 222, 224, (1954)).

The district court relied on a group of lower federal court decisions in purported support of its broadside attack on this statute. (App. A at 11). Reliance on those cases is misplaced. None involved wholesale, checklist review of a complex, comprehensive regulatory statute. Some of those cases suggest that in some

[23] *Broadrick v. Oklahoma*, 413 U.S. 601, 610-611 (1973).

circumstances, federal courts may consider a statutory provision if it has been applied in some other proceedings. Whatever the validity of that proposition in other contexts, it does not apply here. Not one of the five invalidated provisions has ever been interpreted or enforced in any case in which the parties involved complained of constitutional inadequacies. Of the five, the only one that has ever been interpreted or enforced in actual board or judicial proceedings is Section 1389, dealing with elections. The record discloses no objection, constitutional or otherwise, to any of the elections that have been held.

Before the lower court, the appellees also relied on *Doe v. Bolton*, 410 U.S. 179 (1973), and on the generality that the case or controversy requirement is more loosely applied in First Amendment cases. These arguments are also wide of the mark. *Doe v. Bolton* involved a single statutory provision and not a comprehensive regulatory statute. In addition, absent a facial attack, the only way that the provision at issue in *Doe v. Bolton* could have been challenged was by the deliberate commission of a criminal act. That is not true in this case. With regard to the argument that the First Amendment justifies a "roving commission"[24] approach, we know of *no* instance involving a First Amendment challenge or any other in which this Court has entertained an attack on a comprehensive regulatory statute apart from specific involvement of its provisions. In *California Bankers Ass'n v. Schultz, supra*, the Court refused to entertain such a suit. The attack in *Schultz* was based on First Amendment grounds. Moreover, as will be discussed below, First

[24] *Broadrick v. Oklahoma, supra*, at 610-611.

Amendment cases — especially freedom of assembly cases — frequently turn on the facts of the particular case.

It would have been unthinkable, we submit, for this Court to have simply proceeded in checklist fashion through the provisions of the Wagner Act, or Taft-Hartley, or Landrum-Griffin, deciding the fate of each of the provisions of those statutes in the absence of a record dealing with their actual application. Yet, this is precisely what the district court did. The appellees may contend that the Arizona statute poses a greater threat to individual liberties than does its federal labor law counterpart. We would disagree. But that is not the issue. As noted, this Court has never gone through a comprehensive, multifaceted, regulatory statute in Council of Revision fashion, deciding in the abstract the constitutional acceptability of one provision after another, and then based on conclusions concerning selected parts (in this case five) declared the whole act invalid.

Even the Smith Act and the Subversive Activities Control Act — which had much greater chilling effect than the present statute — were considered as required by Article III: as particular provisions were applied to particular individuals in real situations, the constitutional issues were raised in the context of those actual applications.[25] Beyond question, the oppo-

[25] Concerning the Smith Act, see *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957); and *Dennis v. United States*, 341 U.S. 494 (1951). For cases involving application of the Subversive Activities Control Act, see *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 [Continued]

nents of those statutes would have preferred the type of procedure used by the district court here. But that is not how a judicial system bounded by case or controversy works.

The appellees and the lower court relied on the enforcement stipulation. That stipulation provides no support for the district court's adjudication in the abstract. Indeed, it only emphasizes the advisory opinion quality of the decision from which this appeal is taken. Some of the stipulated cases, the secondary boycott cases, involved application of this statute to the appellee union. But the only provisions of the Act that were either interpreted or applied in those cases were parts 6, 7, and 10 of 1385 B. None of these provisions was held unconstitutional by the district court. Moreover, the teaching of this Court's decisions in the Smith Act and Subversive Activity Control Act cases, as well as many others, is that if legitimate constitutional issues were raised in those enforcement proceedings against the union, those cases provide the proper vehicle for deciding the constitutional issue, since it is the record in those cases that will disclose the actual adverse impact, if any, on protected constitutional rights.

The district court's discussion concerning overbreadth cannot convert the appellees' dislike for this Act into a case or controversy. Moreover, the overbreadth discussion ignores the holding and supporting rationale of this Court's decision in *Broadrick v. Okla-*

U.S. 500 (1964); *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Albertson v. SACB*, 332 F.2d 317 (D.C.Cir. 1964), *rev'd*, 382 U.S. 70 (1965); *Communist Party v. United States*, 331 F.2d 807 (D.C.Cir. 1963), *cert. denied*, 377 U.S. 968 (1964); *Communist Party of the United States v. McGrath*, 96 F. Supp. 47 (D.D.C. 1951).

homa, 413 U.S. 601 (1973). As stated by this Court in *Broadrick:* "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[26] At best, the measurement of these twin requirements — that the range of constitutionally protected activity must be real, and that it must be substantial with respect to the prohibitable activity — is difficult. In the absence of a record demonstrating the activity that the challengers in fact undertook in the particular case, it is impossible. In addition, *Broadrick* suggests that its rule may depend on the extent to which "conduct and not merely speech is involved. . . ." In an actual case or controversy the record would show the mix of speech and conduct. There is no such record here.

Section 1392, providing criminal penalties for violations of the Act, has never been enforced. Determination of its constitutionality should await a case involving its application. The district court's holding that § 1392 is facially unconstitutional rests largely on perceived overbreadth problems.

We recognize that not only falling swords, but also hanging swords, can have an effect. However, the only reason that the district court was able to find a Damoclean effect at all is that it consistently selected the only interpretation of the statute that would raise the constitutional question. In consistently assuming the worst, the district court disregarded the principle stated by this Court in the companion case to *Broad-*

[26] 413 U.S. at 615.

rick, Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 578-79 (1973):

> "[T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."

Application of the *Broadrick* test, therefore, depends on the existence of an actual case or controversy. Analysis of *Broadrick* in light of this case shows that here, there is no case or controversy.

2. *Even If There Were a Case or Controversy, the District Court Should Have Abstained, Because the Constitutional Issues Depend on Interpretations of the Statute.*

The lower court's constitutional holdings are laced with necessary rulings as to what the statute means. In each case, the court adopted that view of the statute that would invalidate.

For example:

A. The court's holding that the election procedures are unconstitutional rests mainly on assumptions concerning the time periods that those procedures would consume. One of those assumptions — asserted by the plaintiffs for the first time at trial — is that "the general application of the Arizona Administrative Procedure Act stamps a 20-day period . . . "[27] between the filing of the election peti-

[27] App. A at 26.

tion and the pre-election hearing. The appellants strongly disagree with this view of Arizona law. Section 1389 C requires "an appropriate hearing on due notice." What is appropriate will vary from case to case depending upon the particular facts of that case. The Legislature having provided for an *appropriate* hearing on *due* notice takes this statute out of the general AAPA requirement and permits determination of the needs of the individual case.[28] The district court could not assume that Arizona state courts would interpret the section to require application of the AAPA.

B. Section 1382 1 of the Act defines a permanent agricultural employee as one "over 16 years of age who has been employed by a particular agricultural employer for at least 6 months during the preceding calendar year. . . ." The lower court asserted that the practical effect of this provision was "that a particular worker must be employed during two successive harvests before being entitled to vote."[29] Given the court's conclusion that the constitutional defect in the election procedures rested on time delays and employee transience, this conclusion that as a practical matter the Act granted permanent employee status only to those who had been employed for two previous harvests was significant. It is based on the court's acceptance of the appellees' assertion that

[28] The pertinent part of the Arizona Administrative Procedure Act provides: "In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. *Unless otherwise provided by law*, the notice shall be given at least twenty days prior to the date set for hearing." Ariz. Rev. Stat. Ann. § 41-1009 (Supp. 1977) (emphasis added).

[29] App. A at 28.

"calendar year" means the period from January 1 through December 31. It is the appellants' view that calendar year means a year as measured by the calendar — and therefore a complete year of 365 days — rather than a crop year, which in some cases would be much shorter. Again, this provision has not been interpreted by the Arizona state courts.

C. The court held unconstitutional the prohibition against dishonest, untruthful and deceptive publicity directed against secondary consumers. Substantial reliance was placed on this Court's observation in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (*Times Libel*), that "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' ".[30] In *Times Libel*, this Court held that the breathing space requirement is satisfied by the actual malice test. Even assuming, therefore, the correctness of the lower court's determination that the Arizona Legislature's prohibition against dishonest, untruthful and deceptive secondary consumer publicity raises constitutional issues, *Times Libel* would indiciate that the constitutional requirements would be satisfied by the knowing falsehood or reckless disregard standard. Whether the statutory prohibition incorporates the *Times Libel* actual malice standard is a question of Arizona law concerning which the Arizona courts have not spoken.

D. The district court held unconstitutional the provision in Section 1385 C that "no employer shall be required to furnish or make available . . . facilities

[30] 376 U.S. at 271-72.

to enable [a union] to communicate with employees. . . ." In support of its holding, the court observed:

> "If the grower doesn't have to 'furnish facilities' that clearly means he doesn't have to provide a time or place when the union can communicate with his workers, and thus also means that he does not have to allow them to come onto his property."[31]

Throughout this litigation, the appellants have vigorously disagreed with the foregoing view of this statutory provision. The statute provides that employers are not required to provide *facilities*. Facilities does not mean real property. It means facilities. It means those items that might be used to facilitate communications, such as microphones, platforms, chairs, etc. It may mean structures or buildings. It clearly does not mean that the employer in all cases may deny access to his property and no Arizona court has so held.

E. This Court held in *NLRB v. Gissell Packing Co.*, 395 U.S. 575 (1969), that the NLRB has authority to issue bargaining orders requiring an employer to bargain without a certification election in those instances where employer practices have made it impossible to hold a fair election. This Court has never suggested that *Gissell* rested on constitutional grounds. Nevertheless, the district court found the absence of specific bargaining order authority relevant to the constitutionality of the election procedures under the Arizona Act. Once again, this constitutional decision necessarily depends on inter-

[31] App. A at 39.

pretation of the state statute. The authority of the Arizona Agricultural Employment Relations Board to issue bargaining orders has been the subject of strong and continuous disagreement between the parties. The Arizona courts have never passed on the issue. Once again, the district court adopted the interpretation that raises rather than avoids the constitutional issue. It interpreted the Act to preclude the issuance of bargaining orders, and that interpretation constitutes part of the premise for its conclusion that the election procedures would be applied in such a fashion as to make them unconstitutional.[32]

In each of these five instances, the statute could have been interpreted one of two ways. One interpretation would lead to what the lower court considered to be a serious constitutional question. The other would either totally avoid or at least lessen the constitutional concern.

Under those circumstances, the duty of the federal court is clear. It must either (1) adopt that view of the statute that will save rather than destroy[33] or (2) await an interpretation of the State Supreme Court, whose province it is to say what the statute means.[34]

[32] App. A at 19, 29-30.

[33] *United States v. Vuitch*, 402 U.S. 62, 70 (1971). Arizona law is in accord. *Frye v. South Phoenix Volunteer Fire Co.*, 71 Ariz. 163, 170-71, 224 P.2d 651, 656 (1950).

[34] *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941); *accord, Elkins v. Moreno*, U.S. (1978); *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976); *Carey v. Sugar*, 425 U.S. 73, 79 (1976); *Boehning v. Indiana State Employees Ass'n, Inc.*, 423 U.S. 6, 7-8 (1975); *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 84 (1975).

The lower court's consistent interpretation of controlling principles of an important state statute in a manner that destroys rather than saves, and doing so outside the context of application of those provisions to any plaintiff is ample ground for summary reversal.

At the very least, such a novel approach raises a substantial federal question worthy of this Court's consideration on the merits.[35]

3. *Election Procedures Under the NLRA and the AERA — Policy Choices By Legislature and Judiciary.*

The district court did not hold Section 1389, dealing with representatives and elections, unconstitutional on its face. Invalidity depended upon (1) the court's acceptance of the appellees' view, based on highly speculative and conflicting evidence concerning how the section *might* be applied, and (2) the court's acceptance of the appellees' view concerning two disputed issues of state law, the applicability of the Arizona Administrative Procedure Act to Section 1389's election procedures, and the meaning of "previous calendar year."

[35] The district court offered an explanation in connection with its holding concerning Section 1385 B 8's prohibition against untruthful secondary consumer publicity, discussed *infra*, pages 34-39. The court's opinion states: "Although defendants, as to this particular provision and with so many others, are always proposing the narrowest interpretation possible, and suggesting that this is the way that this, and many other provisions, should be interpreted to save constitutionality of a statute, yet, as has been said, where First Amendment rights are involved, this prohibition in this section of the statute involving as it does a prior restraint on free speech, must be narrowly drawn, and the speaker should not be 'chilled' by the potential that some interpretation of his ex-

[Continued]

With that foundation alone, the court held Section 1389 unconstitutional because of the unlikelihood that elections could be held during periods of peak employment.

Nevertheless, the court did not limit its holding of unconstitutionality to those circumstances that were necessary to its holding, that is, where elections could not be held during peak employment periods. Even accepting the court's view of the evidence and of state law, therefore, the holding presents substantial federal questions for several reasons:

A. *Implicit Doubts Concerning the Constitutionality of NLRA Election Procedures.* The election procedures of the Agricultural Employment Relations Act have been characterized by appellees as "virtually identical to those of the NLRA. . . ."[36] That characterization is correct.

The reason that the election procedures were held unconstitutional was that under certain circum-

pression concerning which he has no knowledge may make his statement 'untruthful.' " App. A at 34.

At least in the context of the holding related to Section 1385 B 8, the court's holding would be understandable if a prior restraint were in fact involved. It is not. There is no record concerning any 1385 B 8 activity. Holding that provision invalid on its face as a prior restraint assumes that the only way it will ever be enforced is by injunction, and that is not what the statute says. If in fact, an injunction were issued under 1385 B 8 against *future* dissemination of untruthful publicity, there would be a legitimate prior restraint issue. Absent such an injunction there is no prior restraint issue, and the asserted basis for the court's departure from the well-established rule that statutes must be interpreted so as to save them, disappears.

[36] Plaintiffs' Proposed Findings of Fact, Submitted to the District Court, p. 8.

stances they might be capable of permitting too long a time period to elapse between petition filing and election. As a consequence, there might be cases in which the election could not be held until after the harvest peak when many employees might be gone. Yet the holding of unconstitutionality is not limited to cases involving crops with short harvest periods. It is a total invalidation, notwithstanding the undisputed evidence that some harvests in Arizona (including the all-important citrus harvest) last practically all year.[37]

The undisputed evidence also shows that election procedures under the NLRA frequently deal with short, seasonal employment in a rather substantial number of industries.[38] Indeed, in many of these

[37] The citrus harvest lasts between 45 and 49 weeks. Tr. 162. The district court found (App. A at 15) that the citrus crop is the State's largest. The opinion also asserts that "[i]n citrus, crews are constantly moved from employer to employer throughout the harvest season picking only intermittently for any particular employer for from a few days to a few weeks." App. A at 16. We know of no support in the record for this statement, but even assuming its correctness, it is irrelevant. Since it is beyond dispute that the citrus harvest lasts most of the year, an employer's crew will return from time to time, affording several opportunities during the year to hold the election. The significance of possible change in crew makeup is discussed in subpart C, *infra*, pages 30-33.

[38] Tr., 88-94. See *Ruby Co., dba Shelly Processing Co.*, 129 NLRB 110, 46 LRRM 1510 (1960) (potato processing); *Bordo Products*, 117 NLRB 313, 39 LRRM 1220 (1957) (fruit processing); *Cleveland Cliffs Iron Co.*, 117 NLRB 668, 39 LRRM 1319 (1957) (Great Lakes shipping); *Sebastopol Cooperative Cannery*, 111 NLRB 530, 35 LRRM 1510 (1955) (apple processing); *Libby, McNeill & Libby*, 90 NLRB 279, 26 LRRM 1205 (1950) [Continued]

industries it is agricultural seasonality that limits the period of peak employment.[39]

For these reasons, a holding that election procedures virtually identical to those of the NLRA are unconstitutional, without limiting the holding to those instances where there are any differences between the two necessarily raises questions concerning the constitutionality of election procedures under the NLRA, particularly as applied to a rather broad segment of industries subject to NLRB jurisdiction. Such a holding presents the clearest possible substantial federal question. It probably amounts to summarily reversible error.[40]

B. *The Constitutional Right Violated.* The district court appears to have taken the view that the constitutional right violated by Section 1389 as it

(vegetable canning); *Alaska Salmon Industry*, 90 NLRB 168, 26 LRRM 1199 (1950) (salmon canning); *S. Martinelli & Co.*, 81 NLRB 1179, 23 LRRM 1361 (1949) (soft drink bottling); *California Growers, Inc.*, 80 NLRB 578, 23 LRRM 1194 (1948) (fruit packing); *Foremost Dairies, Inc.*, 80 NLRB 764, 23 LRRM 1129 (1948) (ice cream manufacturer); *Imperial Tobacco Co.*, 74 NLRB 1038, 20 LRRM 1276 (1947) (tobacco drying and processing).

[39] This is true, for example, in the case of the various agricultural packing and canning industries listed in footnote 38.

[40] The Arizona Board has greater flexibility to deal with the problems of short peak employment than the NLRB has. The Arizona regulations permit the Board, where appropriate, to defer all questions except questions concerning representation until after the election. Thus, once questions concerning representation have been resolved, the Arizona Board, unlike the NLRB, has the authority to order an election immediately. (See Arizona Agricultural Employment Relations Board Regulations R4-2-19 and R4- [Continued]

might be applied is freedom of assembly/association.[41] This holding is totally unprecedented. It is clear that membership in a labor union is protected association. *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 5 (1964). We know of no decision other than the one appealed from, however, that holds or even vaguely suggests that a secret ballot labor election procedure unconstitutionally infringes on freedom of assembly/association.[42] Conceivably, there could be a labor election procedure so unfair that its effect on associational interests would render it constitutionally suspect. This clearly cannot be the case, however, with a statute whose election procedures are "virtually identical to the NLRA" and whose actual impact has only been speculated.

2-22; the Regulations are part of the record in this case. See also Tr. 578, 579, 581, 584, 670.) This effectively gives the Arizona Board the discretion to follow a procedure that is very similar to the California procedure, in those cases where such a procedure is appropriate.

[41] The appellees also took the position that the right to vote was violated. The district court appears not to have accepted that argument, and it is clearly wide of the mark. First, we are unaware of any holding that the constitutionally guaranteed right to vote extends to labor elections. Unions are not public entities. Moreover, assuming that there is a constitutionally guaranteed right to vote in a labor election, it cannot be measured in a vacuum. This Court's decisions dealing with voting rights have always considered the impact on those rights arising out of particular elections. As will be discussed below, the actual impact on voting will vary greatly depending on a number of variables, none of which has been established in this case.

[42] *Cf. International Bhd. of Teamsters v. NLRB*, 568 F.2d 12, 20 (7th Cir. 1977).

This Court's decisions clearly demonstrate that the applicability of freedom of assembly/association principles often turns on variations in the facts of the particular case. Compare, *e.g., Feiner v. New York*, 340 U.S. 315 (1951), with *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Edwards* with *Adderly v. Florida*, 385 U.S. 39 (1966). There is no context in which the facts will vary more from case to case than in agricultural labor. As observed by Mr. Cesar Chavez, National President of the appellee union, "there isn't anything typical in agriculture. It is all over the map."[43]

Of the provisions held unconstitutional, § 1389 is the only one that has been either interpreted or enforced, as shown by the enforcement stipulation. It is also the only invalidated provision concerning which any substantial evidence was presented at trial. Yet neither the enforcement stipulation nor the trial transcript contains any evidence of a single election under the AERA in which time delays raised any problems, or in which these plaintiffs were involved.[44] There is not a single instance, therefore, in which actual application of Section 1389 has borne out the appellees' speculated fears. Neither is there any evidence of any objection — constitutional

[43] Tr. 231.

[44] The reason that these plaintiffs have not been involved in any AERA election is that since they object to the Act they refuse to use it. Tr. 209. This does not alter the fact that they have had *no* experience with this section concerning whose effect they could only speculate, nor the further fact that experience with elections under the Act to date has not disclosed a single instance in which time delays were a problem.

or otherwise — to any aspect of the elections that have been held. This is hardly an appropriate foundation on which to build the first case in history for the proposition that NLRB-type secret ballot labor elections can violate freedom of assembly.

If in fact election procedures identical on their face to those of the NLRA can ever rise to the level of imposing an impermissible burden on freedom of assembly/association, the time to make that measurement and that determination will be when and if it happens. In the meantime, the lower court's holding that such a burden is imposed by NLRA-type procedures without regard to the differentiating facts of the individual case surely raises a substantial federal question.

C. *Policy Choices by Legislators and Judges.* Obviously, peak employment seasons of short duration, either under the Arizona Act or under the National Act, present special problems. The optimum solution to those problems is neither readily apparent nor constitutionally mandated. Perhaps the most grievous error committed by the district court was its assumption that the Arizona Legislature was constitutionally limited in its available policy choices to holding the election during peak employment periods.

There are of course advantages to an inflexible requirement that elections must be held during the employment peak. It permits greater participation during the same season in which the election petition is filed. This basic solution was the one selected by the California Legislature; under its statute, an

election must be held within seven days after the petition is filed.[45]

There are also disadvantages to such a system, however. It permits the union to organize as long as the union considers advantageous,[46] and then to limit post-petition campaigning by both sides. Also, the union can control the date of the election by its decision as to the timing of the election petition filing. In most instances, seven days is too short a period to determine the appropriate bargaining unit, and while these and other pre-election issues can be deferred until after the election, it is certainly not an unreasonable legislative decision to conclude that it is more orderly to leave it to the Board's discretion whether to decide these issues prior to the election.

An alternate to the California scheme is the one employed by the NLRB: hold the election during the current peak season if it is feasible to do so. If it is not, postpone the election until the next peak sea-

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[45] California Agricultural Labor Relations Act, Cal. Lab. Code § 1140 *et seq.* Section 1156.3(a) (West Supp. 1978), requires that the Board "shall direct a representation election by secret ballot . . . within a maximum of seven days of the filing of the petition." Under this procedure, it is theoretically possible for the election to be carried by as few as 26% of the peak employment workers. The election must be held when at least 50% of the employees are present, and a majority of those 50% would be 26%. See Tr. 243.

[46] Mr. Chavez acknowledged that the reason the pre-petition organizational activities took three to six weeks was that the union used that period not just to assure that it had enough support to qualify the petition, but to assure that it had enough support to win the election. Tr. 115, 117, 119.

son, at a date to be determined by the regional director. *Choctaw Cotton Oil Co.*, 84 NLRB 660, 24 LRRM 1307 (1949). This permits the Board to take into account all relevant factors — including the advantages of current peak season elections — rather than restricting the Board to one factor alone. When an industry has two or more seasonal peaks, as is the case with much of Arizona's agricultural production, the delayed representation election is ordered at the time the greatest number of workers is employed.[47] Appellees have not taken issue with the Board's authority to follow the same procedure where appropriate.

Mr. Chavez objected to postponement until the following employment season because the work force might change in the meantime.[48] This argument cuts both ways. To whatever extent it is true, it necessarily means that one group of employees will make representation decisions that will be binding on a significantly different group of employees. This will be true no matter when the election is held. Faced with that kind of situation, the Legislature must have some discretion in making the required policy choices. Certainly the Constitution does not require the Legislature to favor employees who work in the

[47] See, *e.g.*, *Libby, McNeill & Libby*, 90 NLRB 279, 26 LRRM 1205 (1950); *California Growers, Inc.*, 80 NLRB 578, 23 LRRM 1194 (1948). See also Tr. 588-94.

[48] Tr. 167. He also asserted that some of the pro-union employees might not be rehired. If the reason that they were not rehired is because of their union activity, the appropriate corrective would be an unfair labor practice proceeding against the employer under Ariz. Rev. Stat. Ann. § 23-1385 A (Supp. 1977).

first season — some of whom will not return to be bound by the election decision — over employees in the second season who will be bound.[49]

The district court's rationale fails to account adequately for the fact that under the AERA the Board is specifically authorized to decide whether "the unit appropriate for the purposes of collective bargaining shall consist of either all temporary agricultural employees or all permanent agricultural employees ... or both." Section 1389 B. Good faith performance of this duty by the Board should lessen significantly the problem perceived by the district court of one group of employees determining the interests of another. The lower court accepted the appellees' hypothesis that "[a]n employer could ... respond to a petition for an election filed by a small minority of his permanent, year-round employees, and if they should vote for no-union, then no matter how many hundreds or thousands of employees that employer hires for that unit, thereafter they are barred from holding another election for twelve months — clearly an absolute frustration of their right of free association." (App. A at 28-29). This hypothesis assumes either bad faith or bad judgment by the Board in determining the bargaining

[49] Even in California, it is not always possible to hold the election during peak employment periods. Tr. 157, 167. In such a case, the California Board has followed the NLRB procedure. Thus, where the California Board found it necessary to order run-off elections because of unavoidable delay resulting from the determination of objections to the conduct of the initial election, it ordered the run-off to be held during the employer's next peak season. *In the Matter of Tenneco Farming Co.*, 3 ALRB No. 20 (1977).

unit. If such a hypothetical case ever materializes, that will be the time to decide the relevant constitutional issues, in light of the actual facts.

For over four decades this Court has vigilantly prevented judicial meddlesomeness into legitimate state legislative efforts to deal with important issues.[50] The same problem is presented by this case. Few important policy issues are easily soluble. Labor elections in seasonal industries are no exception. The California Legislature has elected one solution. The National Labor Relations Board has elected another. Arizona policymakers, we submit, are not confined to preferring one of these choices over the other.

4. *Dishonest, Untruthful and Deceptive Secondary Consumer Publicity Under the NLRA and the AERA.*

In holding § 1385 B 8 unconstitutional on its face, the district court has again called into constitutional question a provision of the National Labor Relations Act. The proviso to Section 8(b)(4)(ii)(B) of the federal act authorizes "publicity ... for the purpose of truthfully advising the public ... that a product or products are produced by an employer with whom the labor organization has a primary dispute...."[51]

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[50] See *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *Nebbia v. New York*, 291 U.S. 502 (1934). In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976), this Court stated: "That [the state] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional."

[51] 29 U.S.C. § 158(b)(4)(ii)(B) (1970).

Section 1385 B 8 of the Arizona Act, held unconstitutional on its face by the district court, makes it an unfair labor practice:

> "To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name."

There is no realistic difference between the federal proviso and its Arizona counterpart. One permits truthful publicity and the other prohibits untruthful, deceptive and dishonest publicity. There is no practical difference — certainly none of constitutional dimension — between authorizing the truthful and prohibiting the untruthful.

In *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1964) *(Tree Fruits)*, this Court interpreted the proviso in Section 8(b)(4)(ii)(B) of the NLRA to permit a union to apply secondary consumer pressures by picketing as well as by handbilling against the product of an employer with whom the union has a primary dispute. The issue under Section 1385 B 8 of the present Act differs from the issue in *Tree Fruits* in two respects, and the differences cut in opposite directions. First, the Arizona

provision deals with all secondary consumer pressures, whereas *Tree Fruits* dealt only with picketing. Second, it does not prohibit all such publicity, but requires merely that it be truthful. At the very least, the issue raised by this aspect of the district court's holding is substantial. Even accepting the lower court's interpretation of the statute, its holding reaches important issues that were not reached by any of the Justices in the *Tree Fruits* case.

The district court's reliance on *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), and *A.F.L. v. Swing*, 312 U.S. 321 (1941), is misplaced. Those cases involved prior restraints. This case does not. A prior restraint issue would result under this provision only if an injunction were to issue in a particular case, as in *Keefe* and *Swing*. The conduct prohibited by Subsection 8 is an unfair labor practice. As such, it can be dealt with by the Board or by the courts. Neither is limited to prohibiting future activity. Sanctions for past conduct may be imposed.[52] Consideration of § 1385 B 8 on its face, therefore, does not raise the prior restraint issue. The time to consider the possible bearing of *Keefe* and *Swing*[53] on Subsection 8 will be when, if ever, an injunction is issued pursuant to it. In six years of the statute's existence none has issued yet. The prior restraint question was, therefore, not properly before the district court.

[52] The difference between prior restraint and after-the-fact punishment was emphasized by this Court in *Keefe:* "Under *Near v. Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." 402 U.S. at 418-19.

[53] The second aspect of the district court's reliance on *Swing* is also misplaced. *Swing* invalidated a state law that in effect prohibited all primary picketing in the absence of a primary dispute. Section 1385 B 8, by contrast, deals with secondary boycott attempts to subject employers with whom the union has no quarrel to the adverse effects of the boycott. This is, therefore, simply another example of an attempt — common to many labor laws, federal and state — to control secondary boycotts.

[Continued]

This Court has made it very clear that aside from prior restraints, the maximum First Amendment protection to which falsehood is entitled is that afforded by the *New York Times v. Sullivan*, 376 U.S. 254 (1964) *(Times Libel)*, actual malice standard. That was the holding in *Times Libel*, and the point was made even more clear in *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964):

> "[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

It is possible that in the labor setting, falsehood is not entitled even to *Times Libel* protection. The proviso to Section 8(b)(4)(ii)(B) of the NLRA is instructive

in this regard. So also is *United Farm Workers Organizing Committee v. Superior Court*, 4 Cal.3d 556, 483 P.2d 1215, 94 Cal. Rptr. 263 (1971), a case brought by the appellee union's predecessor. In that case the California Supreme Court ruled that "Petitioners may properly be enjoined from making false and untruthful statements in connection with a labor dispute." *Id.* at 571; 483 P.2d at 1226; 94 Cal. Rptr. at 274. Similarly, in *Corrigan v. Barbers and Beauticians Union, Local 253*, 251 Cal. App.2d 490, 59 Cal. Rptr. 533 (1967), the California Court of Appeals held that the distribution of "false and misleading literature" or the carrying of "false and misleading banners" in a labor dispute may be enjoined.

If the prohibition against untruthful secondary consumer pressures is subject to the same strictures held applicable in *Times Libel*, then the first task of the federal judiciary should be to determine whether the *Times Libel* actual malice test applies to this statute. In *Elfbrandt v. Russell*, 384 U.S. 11 (1966), this Court took into account the Arizona Supreme Court's interpretation of the knowledge or intent requirement applicable to Arizona's loyalty oath. A no lesser opportunity should be afforded in connection with this statute, which has significantly greater impact on the people of Arizona. Similarly, the interpretation of the statute in *Tree Fruits* by a majority of this Court was influenced at least in part by the principle that statutes should be interpreted, if possible, so as to make them constitutional.[54] The Arizona courts should be given the same opportunity.

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[54] 377 U.S. at 63.

Before the district court, both sides relied on *Vanasco v. Schwartz*, 401 F.Supp. 87 (S.D.N.Y. 1975), *aff'd*, 423 U.S. 1041 (1976). *Vanasco* involved the regulation of falsehoods in connection with political campaigns. Dicta in that case provide convenient quotations for both sides in this case. The real significance of *Vanasco*, however, is its holding, consistent with *Times Libel* and *Garrison*, "that any state regulation of campaign speech must be premised on proof and application of a *Times* 'actual malice' standard." 401 F.Supp. at 92. In *Vanasco*, the three-judge district court considered the case after the New York State Board of Elections had applied that State's Fair Campaign Code and its own implementing regulations to particular alleged campaign violations and had made findings as to whether the individuals had made statements knowing they were false or acting with reckless disregard for truth or falsity. Any attack on Section 1385 B 8 should have followed that same procedure.

5. *Compulsory Arbitration, Substantive Due Process, and Incorporation of the Seventh Amendment.*

If for no other reason, plenary review by this Court (or summary reversal) would be warranted because a three-judge federal district court has held the Seventh Amendment binding on the states, contrary to the numerous and consistent holdings of this Court and every other court of which we are aware.

The district court's holding and rationale related to the ten-day injunction-compulsory arbitration provision are:

> "We therefore strike down this section of the statute, A.R.S. § 23-1393 (B), as unconstitutional

in violation of the due process clause of the Fourteenth Amendment to the Constitution and the Seventh Amendment providing for right to trial by jury." (App. A at 42).

In support of its due process holding, the lower court cited three cases.[55] The regulations involved in those cases were more pervasive and more burdensome than the provision here at issue. In addition, all three were pre-*Nebbia*, substantive due process cases. The principal case, *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923), was decided just two months after *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), and relied on it as authority. It would seem quite clear from subsequent decisions of this Court that today substantive due process considerations would not bar states from adopting binding arbitration provisions of the limited kind involved in this case.[56] At the very least, a three-judge federal district court's reliance on those pre-*Nebbia* substantive due process cases for such a proposition raises a substantial federal question.

The district court's opinion does not discuss the incorporation issue, but the court has necessarily held that the Seventh Amendment is incorporated into the Fourteenth Amendment, and binding on the states. Otherwise, the Seventh Amendment would not be rele-

[55] *Dorchy v. Kansas*, 264 U.S. 286 (1924); *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923); and *Graves v. Northern P.R. Co.*, 5 Mont. 556, 6 Pac. 16 (1885).

[56] *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *County-Wide Insurance Company v. Harnett*, 426 F. Supp. 1030 (S.D.N.Y.), *aff'd*, 431 U.S. 934 (1977).

vant to the constitutionality of this state statute. We had always assumed that the Seventh Amendment was one provision that would never be incorporated, and scores of cases have so held.[57] If the Seventh Amendment is to be incorporated however — twenty dollar limitation and all — it should be done only after careful consideration by this Court and not by a single sentence pronouncement with no supporting rationale in a district court opinion.[58]

6. *Access to Employer Facilities.*

The district court held § 1385 C, dealing with the employer's "materials, information, time or facilities", unconstitutional in light of the testimony and evidence. It is true that any constitutional issues possibly raised by this section can be determined only in the light of facts. The kinds of facts required, however — even assuming that the Arizona courts would construe the section as the district court did, adverse to its constitutionality — are not part of this record.

The leading case dealing with union organizing activity on employer premises under the National Labor Relations Act is *NLRB v. Babcock and Wilcox Co.*, 351

[57] See headnote 12 to the annotations to the Seventh Amendment in United States Code Annotated for citations to the relevant cases. For illustrative holdings, see *Olesen v. Trust Company of Chicago*, 245 F.2d 522 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957); *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La.) *aff'd*, 409 U.S. 943 (1972); *U-Haul Co. of Alabama v. State*, 316 So.2d 685 (Ala. 1975); *Bringe v. Collins*, 274 Md. 338, 335 A.2d 670 (1975).

[58] *In re Smith*, 381 Pa. 223, 112 A.2d 625, *appeal dismissed*, 350 U.S. 858 (1955), the only case relied on by the district court for the jury trial aspect of its holding, dealt solely with the jury trial provisions of the Pennsylvania Constitution.

U.S. 105 (1956). In that case the Court treated the problem as one of statutory rather than constitutional dimension. The Court clarified that the requirements of § 8 (a)(1) in this respect are as follows:

> "It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature *if reasonable efforts by the union through other available channels of communication will enable it to reach the employees* with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." 351 U.S. at 112. (emphasis added).

This Court further observed in *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972), that "[t]he Board and the courts have the duty to resolve conflicts between organization rights and property rights, and to seek a proper accommodation between the two."

There is no suggestion in *Babcock and Wilcox* or *Central Hardware* that the requirements of Section 8(a)(1) represent a constitutionally irreducible minimum.[59] Even assuming that they did, however, the unmistakable teaching of those cases is that union access to employer premises depends upon the facts of the particular case, particularly, the availability of other channels of communication, and whether the employer has discriminated against the union by allowing other distribution. There is of course no

[59] This point was reemphasized by *Hudgens v. NLRB*, 424 U.S. 507 (1976), involving striking members of the union picketing in front of their employer's store located in a shopping center. The Court observed, "the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act." *Id.* at 521.

evidence of this kind on the record, because this case does not involve any specific application of the provision in question.[60]

The district court's holding necessarily rests, therefore, on three assumptions: (1) that under Arizona law facilities does not mean facilities, it means premises; (2) that the *Babcock and Wilcox* standards are constitutionally required; and (3) that under all circumstances in which § 1385 C will be applied, the employer will violate the requirements that there be other available channels of communication and that there be no discrimination against the union by allowing other distribution.[61]

[60] Indeed, though the district court declared that its holding concerning this subsection was one of the two provisions in connection with which evidence needed to be considered, (App. A at 6, 14) the court did not list § 1385 C as one of the provisions as to which evidence was presented. The opinion states: "Evidence presented during the four day trial was introduced relative to A.R.S. § § 1384, 1385(A)(5), 1385 (B)(11), 1385(D), 1389, and on the plaintiffs' claim that the exclusion of stitchers and haulers and sixteen-year olds from the AERA, § 1382(1) and 1382(1)(g), was a violation of the Equal Protection Clause as well as a similar claim that exclusion of those farm workers who did not work for the same employer the previous calendar year from representation elections was likewise a violation of the Equal Protection Clause." *Id.* at 5.

[61] Despite its assertion that its ruling on § 1385 C was in light of the evidence, the district court's only factual determination related to this provision is its reference to "testimony and other evidence and really not disputed by defendants that the vast majority of farm workers are migratory and generally reside in areas or labor camps located on property owned by the employer. . . ." App. A at 37. This assertion is not supported by the evidence (See Tr. 221-24, 254, 517) and is "disputed by defen-

[Continued]

7. The District Court Erred in Concluding that Constitutional Defects in Parts or All of Four Sections Required Invalidation of the Entire Act.

The AERA consists of fifteen sections. These sections are interrelated in the sense that they constitute a comprehensive effort to deal with the varied problems of agricultural labor. Many parts of the Act deal with separate subjects, however, and implement policies that are not dependent on other parts. The prevention of unfair labor practices, for example, has a totally separate existence and function from the election procedures.

Of these fifteen sections, the district court held that only two were totally invalid. (One of these, Section 1392 dealing with criminal penalties, the court conceded to be severable.[62]) It also found constitutional defects in parts of two other sections.[63] The court

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dants." Far more important, however, the controlling facts do not concern where the workers live, but whether there are adequate alternative means of communication, and whether the employer has discriminated. The district court's suggestion that § 1389 I somehow forecloses alternatives is obviously wrong. Section 1389 I deals only with the employer's obligation to furnish a list of employees in connection with an election. It has nothing to do with alternative means of communication, which would vary from case to case, depending on such physical circumstances as the layout of the employer's property, the employer's attitudes concerning the use of that property, and other nearby property that might be used for publicity purposes.

[62] See App. A at 12.

[63] Two of the five invalidated provisions are parts of the same Section, 1385 B 8, prohibiting untruthful, etc. secondary consumer pressures, and 1385 C dealing with access to employer facilities.

therefore declined to find constitutional defects in the great majority of the statutory provisions, including many vigorously attacked by the appellees. Nevertheless, the entire Act was held unconstitutional.

This wholesale invalidation flies in the face of common sense and the square holdings of this Court. The point is best illustrated by the unfair labor practice provisions. The Arizona Legislature has concluded that the twenty practices described in subsections 1385 A and B are inimical to state policy. Each represents a separate policy determination. They include such practices as employer interference with his employees' rights to join and participate in union activities, employer domination or interference with the formation or administration of labor organizations, secondary boycott activities, union picketing of an employee's home, and violent conduct for the purpose of preventing the marketing of agricultural products. Before the district court, the appellees advanced constitutional challenges to six of the twenty unfair labor practices, parts 6, 7, 8, 11, 12 and 13 of § 1385 B. The court ruled in their favor on only one of the six, Section 1385 B 8. Despite the court's declination to accept the appellees' argument concerning five of the six challenged unfair labor practices, the appellees have succeeded in invalidating not only the remaining five, but also the fourteen that they did not even challenge. This includes the prohibitions against *employer* unfair labor practices, which are no more dependent on any of the invalidated provisions than if they appeared in a separate statute. Six of the twenty cases brought under the Act as of January of 1977 were unfair labor practice proceedings. (See enforcement stipulation.) None of those cases depended in any way on the existence of

any of the five invalidated provisions. The State has a legitimate interest in continuing to prohibit and punish unfair labor practices, either by employers or by unions.

The district court's only justification for its broadside interdiction of the statute is contained in two sentences. In its discussion of the election procedures, the court asserts that: "If [Section 1389, dealing with elections] fails, the rest of the Act must fail, since most of the use of the Act would apply only if farm workers were initially free to organize and not if the exercise of such a constitutional freedom of assembly were made impossible." (App. A at 25). Similarly, at the conclusion of its opinion the court states that its holding concerning election procedures, "coupled with the other sections struck down, results in a complete perversion of the expressed intent of the Legislature. . . ." (App. A at 43).

These *a priori* assertions represent a total failure even to consider, much less apply, the standards for severability prescribed by this Court.[64] The assertions are also wrong.

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[64] The general rule was stated by this Court in *Champlin Rfg. Co. v. Corporation Commission of the State of Oklahoma*, 286 U.S. 210, 234 (1932), as follows: "The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." See also *Buckley v. Valeo*, 424 U.S. 1 (1976), and *United States v. Jackson*, 390 U.S. 570 (1968). The Arizona rule is virtually the same. *State ex. rel. Berger v. Superior Court*, 106 Ariz. 365, 476 P.2d 666 (1970).

Very simply, the proscriptions against employers' making financial contributions to a union, or against a union's picketing an employee's home, stand on their own as policy determinations by the Arizona Legislature. They do not depend on election delays, binding arbitration, untruthful secondary consumer picketing, or union access to employer facilities. Even if the district court were right as to the five provisions held unconstitutional, the legislative determinations remain that Arizona needs an agricultural labor board; that that board needs authority to conduct investigations, issue subpoenas, hold hearings, order reinstatement and back pay, and issue cease and desist orders concerning 19 uninvalidated unfair labor practices; that even though the bargaining representative cannot be chosen by the employees in a secret ballot election as determined by the Legislature, the collective bargaining process should be conducted according to law; that contracts resulting from collective bargaining are entitled to statutory protection; that physical threats against consumers should not be permitted; and so forth.

Even if all of the other errors were ignored, therefore, the parts of the statute not specifically invalidated by the district court's opinion should be allowed to continue to function.

CONCLUSION

The district court should never have considered this case at all. The constitutionality of the invalidated provisions depends on state law that has not been declared and facts that have not occurred.

Having considered the Act, the court has not only invalidated it in its entirety; it has also — unintention-

ally but unmistakably — called into constitutional question the election procedures of the National Labor Relations Act as they apply to a broad segment of industries under NLRB jurisdiction.

It is apparent that the district court committed many serious errors, any one of which presents a substantial federal question. Because some of these errors are so obvious, the most appropriate corrective is summary reversal. Absent reversal, review is required. The federal questions are substantial, and the interests of the people of Arizona in this statute are too important for its wholesale rejection by one court to be both the first and also the last word on the matter.

Moreover, the impact of the judgment appealed from reaches beyond Arizona. Congress having left agricultural employees outside the protection of the national labor laws, other states will find it necessary to fashion appropriate solutions to the vexing problems of labor strife in their farms and their fields. In setting about this difficult and important task, they are entitled to know whether their options are as limited as declared by the court below.

The unusual burden imposed on this Court by appeals from three-judge federal district courts will continue to diminish. We respectfully submit that during the interim, there is a special obligation to review those decisions as to which there will be no appellate review at all if this Court declines jurisdiction. This is especially true of a decision invalidating in its entirety a comprehensive effort of a state legislature to deal with a problem of unquestioned importance.

Probable jurisdiction should be noted or the judgment of the district court summarily reversed.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED FARM WORKERS NATIONAL UNION on behalf of itself and its members, et al., *Plaintiffs,* vs. BRUCE BABBITT, Governor of the State of Arizona, et al., *Defendants,* ARIZONA FARM BUREAU FEDERATION, an Arizona corporation, et al., *Intervenors.*	NO. CIV 72-445 PHX CAM OPINION AND ORDER

Before KILKENNY, Circuit Judge, CRAIG and MUECKE, District Judges

MUECKE, District Judge:

STATEMENT OF THE CASE

Plaintiffs filed this action for declaratory and injunctive relief together with an application for a three-judge court under the provisions of 28 U.S.C. § 1343, 42 U.S.C. § 1983, and 28 U.S.C. § 2201, et seq., seeking to have Arizona's Agricultural Employment Relations Act (AERA), A.R.S. §§ 23-1381, et seq., declared unconstitutional.

Plaintiffs in this action are the United Farm Workers National Union (U.F.W.), on behalf of itself and its members; Gustavo Gutierrez, an agent of the U.F.W. in the State of Arizona; Ruben Alaniz and Matilda Varela, farm workers, on behalf of themselves and all other farm workers; and Wendy Rose, an individual supporter of the U.F.W., on behalf of herself and all other similarly situated U.F.W. supporters.

Defendants are Bruce Babbitt, Governor of the State of Arizona; Jack La Sotta, Acting Attorney General; Bert Fleming, Treasurer; Raymond Long, Finance Commissioner; Gene Blake, William S. Borce, Jack Montgomery, Keith Walton, Jack McManus, Milton G. Sanders, individually and as members of the Arizona Agricultural Relations Board; and Theresa Bond, in her capacity as Executive Secretary of the Board.

The Arizona Farm Bureau Federation, the Arizona Grape Growers Association, the Vegetable Growers Association, all being Arizona corporations; and the Yuma Citrus Shipper's Association, and unincorporated association, all sought and were granted invervention in the suit on November 5, 1973.

Plaintiffs ask this Court to find that the Agricultural Employment Relations Act (AERA) violates the constitutional rights of the plaintiff U.F.W. and its members by restricting the exercise of their constitutional rights in several broad areas.

Provisions of the United States Constitution which plaintiffs claim are violated by the Act are the First and Fourteenth Amendments with respect to specific provisions of the Act, which provisions it is alleged violate freedom of speech and assembly and the due process and equal protection clauses of the Constitution.

In particular, plaintiffs' arguments deal with nine separate issues and at least as many provisions of the AERA in support of their contention that the AERA is unconstitutional. Those issues and the statutory provisions dealt with are: (1) A.R.S. § 23-1385(B)(6) and (7) [generally dealing with secondary boycotts as an unfair labor practice]; (2) A.R.S. § 23-1385(B)(8) [publicity directed at the ultimate consumer regarding nonuse of agricultural product as an unfair labor practice]; (3) A.R.S. § 23-1385(B)(12) [recognitional picketing as an unfair labor practice]; (4) A.R.S. § 23-1389 [employee representation and election procedures]; (5) A.R.S. § 23-1385(C) [access by union to workers on employer property]; (6) A.R.S. § 23-1382(1) [exclusion of stitchers and haulers from AERA]; (7) A.R.S. §§ 23-1384, 23-1385(B)(11), 23-1385(D) [elimination of "management rights" from bargaining process]; (8) A.R.S. §§ 23-1385(B)(13), 23-1393(B) [restriction and prohibition against striking and picketing]; and finally, (9) A.R.S. § 23-1392 [criminal penalties for violation of the Act].

The defendants have disputed the unconstitutional effects of the AERA as claimed by plaintiffs, and have consistently argued that this challenge fails to present a justifiable claim, both as to the substantiality of the federal questions presented by plaintiffs, and because they argue no case or controversy is presented to the Court. They also ask that this Court abstain from de-

ciding this case. As will become clear in this decision, the doctrine of abstention is not applicable to this case.

Defendants further claim that all testimony and other evidence received by this Court during the course of a four day nonjury trial on January 18, 19, 20, and 21, 1977, should be rejected by this Court as immaterial and completely conjectural and consisting of legal conclusions rather than factual evidence — even opinions and testimony given by the defendants' own experts.

As to this last point, defendants impose too restrictive a view on the admissibility and character of the evidence submitted in this case. Under Rules 701, 702, 703, and 704 of the Federal Rules of Evidence, much of the testimony of the experts relied upon by both parties is admissible either as of the type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject, or of the kind of specialized knowledge that assists the trier of fact in determining facts in issue, ultimate or otherwise.

A pertinent example would be the opinions expressed by the experts of both sides as to time periods to be expected in the operation of various provisions of the Act, the length of growing seasons, facts growing out of their personal experiences with organizing unions, or in the operation of analagous statutes, i.e., the National Labor Relations Act or the California Agricultural Labor Relations Act.

Again as to this last point, i.e., testimony concerning operation of the analagous statutes, what is admissible as to this line of testimony is not an opinion of the expert as to the legal effect of the particular provision of the AERA, but rather, given a particular interpretation of a provision, a hypothetical if you will as to the legal effect of a provision, the opinion of the expert as to the practical effect of such an interpretation based on his previous experience and expertise *is* admissible *if* the legal premise on which the question is based is accepted by the court. Even if a hypothetical question as such is not asked, but it is obvious that the opinion of the expert is based on a certain interpretation of a statutory provision, which the court accepts as the appropriate interpretation, then the interpretation and resultant opinion testimony based on this interpretation is admissible. *Burlington Northern, Inc. v. Boxberger,* 529 F.2d 284, 286-87 (9th Cir., 1975); *United States v. School District 151, etc.,* 404 F.2d 1125, 1134-35 (7th Cir., 1968); *Confederated Tribes of Warm Springs Reservation v. United States,* 177 Ct.Cl. 184 (1966).

Evidence presented during the four day trial was introduced relative to A.R.S. §§ 1384, 1385(A)(5), 1385(B)(11), 1385(D), 1389, and on the plaintiffs' claim that the exclusion of stitchers and haulers and sixteen-year olds from the AERA, § 1382(1) and 1382(1)(g), was a violation of the Equal Protection Clause as well as a similar claim that exclusion of those farm workers who did not work for the same employer the previous calendar year from representation elections was likewise a violation of the Equal Protection Clause.

JURISDICTION

As a result of foundation questions asked of the witnesses, Caesar Chavez, Stanley Lubin, George W. Campbell, and James W. Cherry, this Court accepts all four as experts competent to give the opinions to which they testified.

It is the opinion of the Court that evidence need only be considered with respect to A.R.S. § 23-1389, the provision of AERA dealing with "Representations and elections," and with respect to A.R.S. § 23-1385(C). However, before setting forth the Court's findings as to these facts, the initial issue raised by defendants, namely, their allegation that this Court does not have jurisdiction because there is not a substantial federal question or a case or controversy presented to this Court by plaintiff's challenge to the AERA, will be settled.

Defendants in consistently espousing this view, that this Court does not have jurisdiction, have again emphasized in their argument that a single judge would have had jurisdiction to dismiss this case upon the Article III grounds and that this holds true even more so with the three-judge court.

The lack of jurisdiction motion was initially denied by the district judge prior to the empanelling of a three-judge court. Then the matter remained unresolved by this panel because of plaintiffs' contentions that the AERA was invalid on its face as overbroad and vague with respect to alleged infringement of constitutional rights. This, coupled with the criminal penalty provisions and the complexity of the case, made postponement of the jurisdiction question until after the trial a reasonable course of action. In so ruling we left Article III open as a threshold question and could proceed to a decision on the merits once jurisdiction was settled.

Plaintiffs' response to defendants' Article III attack is that such attack is not valid because of the "Stipulation Regarding Enforcement of the Act," filed by the parties, which reflects some seven suits have been filed against the plaintiff (U.F.W.) and its members and supporters based on sections of the AERA, and that as a result speech activities have been enjoined including handbilling and oral conversations — on three occasions by an *ex parte* temporary restraining order without notice or hearing.

In addition, plaintiffs argue that the Board itself has initiated charges against the U.F.W. which resulted in limitations on plaintiffs' rights. Finally, plaintiffs note that in *Roy's Liquor, et al., v. United Farm Workers* (set forth in the said stipulation), the Board apparently held they had no jurisdiction to consider challenges to the constitutionality of the Act.

From these examples cited by plaintiffs, and not controverted precisely by defendants, it must be concluded that this case is not hypothetical, abstract, or generalized.

As the court said in *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S.Ct. 1409 91 L.Ed. 1666 (1947), a case or controversy is created by a showing that one is injured by the statute's operation or that a construction of the statute to avoid the constitutional questions is impossible. Certainly a challenge for facial invalidity meets the *Rescue Army* test.

In addition to those matters contained in the stipulation, there is the matter of the criminal penalty provision of the statute, which reads as follows:

§ 23-1392. *Penalties.*

> Any person who willfully resists, prevents, impedes or interferes with any members of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who violates any provision of this article is guilty of a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than one year, or both. Provided, however, that none of the provisions of this section shall apply to any activities carried on outside the state of Arizona.

It would appear on the face of this provision of the AERA that it cuts across and covers the entire Act, not just a limited area where a criminal penalty might be acceptable. It says in plain English that it applies to "any person" and further to any person "who violates any provision of this article is guilty of a misdemeanor. . . ."

Considering the enormous variety of activities covered by the Act, and the fact that (as will be more fully discussed later) many of these involve First and Fourteenth Amendment constitutional rights, it is clearly a statutory provision so vague that men of common intelligence can only guess at its meaning. Conduct can only be prohibited and punished by certain, clear statutes, and such precision is necessary so that "the ordinary person can know how to avoid unlawful conduct." *U.S. v. Sullivan,* 332 U.S. 689, 68 S.Ct. 331, 92 L.Ed. 297 (1948). Even closer scrutiny is warranted where the regulation covers freedom of

speech. *Ashton v. Kentucky,* 384 U.S. 195, 86 S.Ct. 1407, 16 L.Ed. 2d 469 (1966).

In an area where application of a penal statute may restrict freedoms protected against state invasion by the Fourteenth Amendment's incorporation of the Bill of Rights, the U. S. Supreme Court has been constantly vigilant and protective of these rights.

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute, susceptible of sweeping and improper application. *NAACP v. Button,* 371 U.S. 415, 432-3, 83 S.Ct. 328, 9 L.Ed. 405 (1963).

The overbroadness and vagueness already discussed are compounded by the provision that the U.F.W. is bound by the acts of its agents and whether or not the acts so performed "were actually authorized or subsequently ratified shall not be controlling." A.R.S. § 23-1393(F). Since the Act restricts the U.F.W. and its agents, and provides criminal penalties for violation by any person, the U.F.W. could be subject to sanctions regardless of its relationship to the agent.

There is no way for anyone to guess whether criminal provisions will apply to any particular conduct, in advance, and it is clear that the statute is unconstitutionally vague and does not adequately define prohibited conduct and is, therefore, in violation of the due process clause of the Fourteenth Amendment. *Whitehall v. Elkins,* 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed. 2d 228 (1967); *Keyesbian v. Board of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Elf-*

brandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed. 2d 321 (1966); *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958); *Conally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

Recently the U. S. Supreme Court considered the case or controversy issue in the context of a challenge to a criminal statute. In *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed. 2d 201 (1973), the Supreme Court addressed the question whether a licensed physician's challenge to a Georgia anti-abortion statute presented a justiciable controversy. In that case, there was no record of a pending or threatened criminal prosecution and the Act had not been enforced against the plaintiffs. Still the court found a controversy did exist and reversed the lower court's dismissal saying:

> The physician is one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory options and conditions. The physicians-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo criminal prosecution as the sole means of seeking relief. *Crossen v. Breckenbridge*, 446 F.2d 833, 839, 839-840 (6th Cir. 1971); *Poe v. Menghini*, 339 F.Supp. 986, 990-991 (Kan. 1972).

Throughout their arguments the intervenors and defendants have argued that there is no case or controversy here since no criminal prosecution has been commenced against the plaintiffs.

At the same time, as their memorandum reveals, they are also aware that were there pending criminal cases against the plaintiffs under AERA, this Court would hesitate to take jurisdiction for reasons of equity, comity, and federalism.

Yet courts have found case or controversies when criminal statutes were challenged as overbroad even before the acts went into effect or there had been any enforcement. *Wounded Knee Legal Defense/Offense Committee v. F.B.I.*, 507 F.2d 1281 (8th Cir. 1974); *Brown v. Brannon*, 399 F.Supp. 133, aff'd 535 F.2d 7249 (4th Cir. 1975); *Hjelle v. Brooks*, 377 F.Supp. 430 (D.Alas. 1974); *Stoner v. Miller*, 377 F.Supp. 177 (E.D.N.Y. 1974); *Associated Students, University of California at Riverside v. Attorney General of the United States*, 368 F.Supp. 11 (C.D. Cal. 1973); *Valley Health Systems v. City of Racine*, 369 F.Supp. 97 (E.D. Wisc. 1973); *Mortillaro v. State of Louisiana*, 356 F.Supp. 521 (E.D. La. 1972).

The significance of these cases is clear; that is, if plaintiffs are persons against whom the particular criminal statute directly operates, and whether they assert a sufficiently direct threat of personal detriment.

There can be no question that the plaintiffs in the present lawsuit are precisely those persons and organizations whose activity the penal statute was designed to regulate, and they have asserted a direct threat of personal detriment both through its past enforcement as well as the threat of its continued enforcement.

It is true that A.R.S. § 23-1392 of the AERA relating to penalties is severable, and that if so severed and declared invalid, the rest of the Act could stand as it is not dependant for its operation upon this section. However, it is sufficient in and of itself as being unconstitutionally invalid and void on its face to give this Court jurisdiction and create a case or controversy.

If the plaintiffs are correct in their contentions that many provisions of the AERA are unconstitutional and void on their face, then a substantial federal question exists as to the constitutional rights that are infringed upon by the AERA and this Court would have jurisdiction. However, if defendants maintain that any sections of the Act found to be unconstitutional are severable, then the remainder of the Act could stand as operable law.

Where it is not possible to separate that part of a law which is unconstitutional from the rest of the law, the whole law fails. *Lynch v. U.S.*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922); *Harrison v. St. Louis & S.F.R. Co.*, 232 U.S. 318, 34 S.Ct. 333, 58 L.Ed. 621 (1914); *Gherma v. State*, 16 Ariz. 344, 146 P. 494 (1915).

A law is void on its face if it does not aim specifically at evils within the allowable area of governmental control, but sweeps within its ambit other activities that constitute an exercise of protected expressive or associated rights. (see: "The First Amendment Overbreadth Doctrine" 83 Harv. L. Rev. 844 (1970).)

> A plausible challenge to a law as void for overbreadth can thus be made when (1) the protective activity is a significant part of the law's target, and

> (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a simple step from the law's reach.

> In laws having these two characteristics, the usual approach of constitutional adjudication — gradually cutting away the unconstitutional aspects of a statute by invalidating its improper applications case by case — does not respond sufficiently to the peculiar vulnerable character of activities protected by the first amendment. For an "overbroad" law of the sort described here "hangs over [people's] heads like a Sword of Damocles." *Arnett v. Kennedy*, 416 U.S. 134, 231, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974). That judges will ultimately rescue those whose conduct in retrospect is held protected is not enough, "for the value of a Sword of Damocles is that it hangs — not that it drops." The resulting deterrent to protected speech is not effectively removed if "the contours of regulation would have to be hammered out case-by-case and tested only by those hardy enough to risk criminal prosecution [or other sanctions] to determine the proper scope of regulation. *Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965). The only solution, then, is to strike down such an overbroad law altogether. ... This result may be understood as an exception to the rule that individuals are not ordinarily permitted to litigate the rights of third parties, since an individual whose conduct may not itself be protected by the first amendment is awarded a judicial victory on the claim of a law's potential unconstitutional applications to the conduct of persons not before the court.

American Constitutional Law, Laurence H. Tribe, The Foundation Press, 1978.

CONCLUSIONS OF LAW

After consideration of the many-pronged attack made by plaintiffs on the constitutionality of the various provisions of the AERA, and the defendants' response thereto, this Court finds and concludes that the Agricultural Employment Relations Act, A.R.S. §§ 23-1381, et sequence, is unconstitutional in its entirety for the reason that A.R.S. §§ 23-*1385(B)(8)*, 23-*1392*, 23-*1393(B)(1)* are unconstitutional and void on their face, and A.R.S. §§ 23-*1385(C)* and 23-*1389* are likewise unconstitutional when considered in context with the testimony and other evidence presented, and these sections are found to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and in violation of the freedom of speech and assembly provisions and of the due process and equal protection clauses with A.R.S. § 23-1393(B) also found to be in violation of the Seventh Amendment providing for right to trial by jury and with the rest of the Act falling by reason of its inseparability and inoperability apart from the provisions found to be invalid.

FINDINGS OF FACT

Turning now to the facts found by this Court to be pertinent to a consideration of the constitutionality of A.R.S. §§ 23-1385(C) and 23-1389.

The majority of agricultural employees as defined by the AERA are directly engaged in the planting, preparation and/or harvesting of row crops, field crops, tree fruits, and grapes. The greatest number of field workers employed by an agricultural employer are

employed during the peak of the harvest season. This peak period is that time when fifty percent or more of the highest number of agricultural employees employed at any time during the harvest season are employed.

Most of the agricultural employees in Arizona, about seventy-five to eighty percent of the total man-days worked each year, are employed in the growing and harvesting seasonal fruits and vegetables. Major crops in this category include lettuce (approximately twenty percent), citrus (approximately twenty-two percent), grapes and deciduous trees (approximately five to ten percent), vegetables, other than lettuce, including green onions, dry onions, carrots, cauliflower, broccoli, cabbage, etc. (approximately twenty percent), and cantaloupes (approximately five to ten percent).

The length of the harvest season and times of peak employment are for the most part very short. The great majority of the lettuce crop in Arizona is harvested in separate spring and fall harvests. The length of these harvest seasons for any particular employer ranges from four to six weeks within which there is a period of peak employment of only three to four weeks.

The grape harvest occurs once annually and lasts from four to six weeks with a period of peak employment of three to four weeks.

Cantaloupes are harvested in from three to seven weeks with a peak of only two to three weeks while the dry onion harvest for any single agricultural employer usually takes about two to four weeks.

The citrus harvest in Arizona lasts for ten to eleven months, approximately from September to mid-July. Green onions may be harvested for as long as ten months of the year. Even in these latter crops, citrus and green onions, there are factors which make the period of employment of particular workers for a specific employer considerably shorter than the length of the total harvest. Employers do not always have each successive crop ready for harvest at the end of the harvesting of the preceding crops. Therefore, the work is intermittent and employees often must switch employers. Many of the workers are migratory who must leave an area immediately after a harvest to find other employment. Many employees do not return to the same employer in a following year so that each year there is a substantial change in the work force.

Green onions also involve an industry where there is tremendous turnover because workers are paid on a daily cash basis and because many minors are employed.

In citrus, crews are constantly moved from employer to employer throughout the harvest season picking only intermittently for any particular employer for from a few days to a few weeks.

If an election is to be held so that a majority of employees of a particular grower can participate, such an election must be held during the period of peak employment. To accomplish this, the law should assure that an election can be petitioned for during such peak periods, and that the procedures for holding elections does [sic] not extend in time beyond the period of peak employment.

Any labor organization seeking to organize Arizona agricultural workers employed in these industries must by reason of provisions of the AERA relating to the representation and election provisions of the AERA, and because of the very nature of the organizational process based on previous experience with analogous statutes, e.g., National Labor Relations Act and the California Agricultural Labor Relations Act, take certain periods of time to accomplish certain organizational goals.

For example, it takes approximately three to six weeks for a union to gather authorization cards to be submitted with a petition for a representation election. Activities which must be carried out by the union during this time include locating all the various fields of an employer, identifying his employees, contacting those employees, and informing and persuading them to sign authorization cards. This cannot be done until the harvest season has begun since there is a substantial turnover in employees from year to year and it is impossible to determine who will work for an employer until that person is actually found in the field. Also to protect employees from possible empolyer retaliations, organizing must be done at a time relatively near the election.

It is usually within an employer's power to delay the process of obtaining sufficient authorizations by employing coercive tactics to discourage union activities among his employees.

Much of the work of reaching agricultural employees must be done on the employer's property, since most agricultural employees are migrants with no permanent residence in the area and live in labor camps on the employer's premises.

The election procedures of the AERA are virtually identical to those of the National Labor Relations Act which, in a contested election, requires from six to seven weeks for completion.

The election provisions of the AERA call for a Board investigation of the petition, the setting and holding of a pre-election hearing upon the demand of the employer, decision of issues raised at the hearing, and granting the employer ten days to provide a list of employees to the Board and the union.

The experience of the plaintiff U.F.W. in participating in over 400 elections in California in the agricultural industry was that it took from three to six weeks before petitions could be filed. Under NLRB experience the hearing is not held until from fourteen to twenty-one days after the petition is filed.

The six to seven week period between the filing of a petition and the holding of an election will be longer than many of the seasons of peak employment. When this period is added to the three to six weeks of work which must be done before a petition can be filed, the entire process cannot take place before the majority of the employees finish their work and leave their place of employment.

Experience under both the N.L.R.A. and in California employer-employee situations in the agricultural industry, has shown that some employers do utilize such coercive and intimidating tactics during elections that both the NLRB and the California Board have found that even after remedial action for unfair labor practices, it was impossible to hold a fair, uncoerced election.

In such situations it has been determined that the only way to preserve the employees' right to collective bargaining was to issue orders to bargain to the employer, absent an actual certification through a secret ballot election.

Absent such power to issue such bargaining orders, the Board, acting pursuant to the AERA, would be without adequate remedy to protect employee rights to collective bargaining. Since the AERA prohibits the Arizona Board from issuing such an order requiring an employer to bargain with a union, unless that union is certified through an election, the AERA encourages employers to commit those types of unfair labor practices which result in election coercion and in turn to a "no-union" vote. Such a practice could be engaged in year after year, effectively delaying any bargaining.

REPRESENTATION AND ELECTION PROCEDURES

Having stated these facts, our consideration turns naturally to that provision of the Act most important to a consideration of its constitutionality. This is A.R.S. § 23-1389 (employee representation, recognition, and election procedures). For a full analysis of this point as well as an exhaustive analysis of the AERA, see: "State Regulation of Agricultural Labor

Relations — The Arizona Farm Labor Law — an Interpretive and Comparative Analysis." Warren H. Cohen, Jonathan Rose. Law and the Social Order, 1973, p. 313 through 431, at 322.

The stated legislative purpose of the Act as enunciated in its "Declaration of Policy," A.R.S. § 23-1381, is said to be:

> . . . the policy of this state that agricultural employees shall be free to organize, to take concerted action, and through representatives of their own choosing enter into collective bargaining contracts establishing their wages and terms and conditions of employment; . . ."

Such a stated policy is but a recognition of the First Amendment right to free speech, to assemble peaceably, and the due process right of all in America who desire to do so to participate and retain membership in a union. *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *N.A.A.C.P. v. Alabama, ex rel. Paterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958); *Hagne v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1414 (1939); *NLRB v. Jones and McLaughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed 893 (1937); *Lontine, et al., v. Van Cleave*, 483 F.2d 966 (10th Cir. 1973); *American Federation of State, County & Municipal Employees v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 2d 430 (1945). See also "A Preliminary Survey of the Arizona Farm Labor Act," Robert A. Kerry, *Arizona Law Review*, Vol. 14, No. 4, p. 766 at 801.

The section in question reads as follows:

§ 23-1389. *Representatives and elections*

A. Representatives selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in a unit appropriate for such purposes shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. If ratification of any such contract is required, the right to vote in such ratification shall be limited to the employees in the bargaining unit. Any individual agricultural employee or a group of agricultural employees may at any time present grievances to their agricultural employer and have such grievances adjusted, without the intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect. The bargaining representative shall be given opportunity to be present at such adjustment.

B. The board shall decide in each case whether in order to ensure to employees the fullest freedom in exercising their rights the unit appropriate for the purposes of collective bargaining shall consist of either all temporary agricultural employees or all permanent agricultural employees of an agricultural employer working at the farm where such employer grows or produces agricultural products or both. In making unit determinations the extent of a union's extent of organization shall not be controlling. Principal factors should be the community of interest

between employees, same hours, duties and compensation, the administrative structure of the employer and control of labor relations policies.

C. The board shall investigate any petition, and if it has reasonable cause to believe that a question of representation exists shall provide for an appropriate hearing upon due notice, when such petition has been filed in good faith in accordance with such regulations as may be prescribed by the board:

1. By an agricultural employee or group of agricultural employees or any individual or labor organization acting in their behalf alleging that thirty per cent or more of the number of agricultural employees in the unit in question either wish to be represented for collective bargaining and that their employer declines to recognize their representative or assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative is no longer a representative.

2. By an agricultural employer alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative or that an individual or labor organization which has previously been certified as the bargaining representative is no longer a representative.

D. If the board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. If a second labor organization files a petition for an election alleging that

thirty per cent or more of the employees in the unit in question desire to be represented by that labor organization, then the board shall require that the names of both labor organizations shall appear on the ballot. In any election the voters shall be afforded the choice of "no union". If in a representational election where more than one union is on the ballot, and none of the choices receives a majority vote, a second election shall be held. The second election shall be between the union receiving the highest number of votes and "no union". In any election a labor organization shall obtain a majority of all votes cast in that election in order to be certified as the bargaining representative of all the employees in that unit.

E. In determining whether or not a question of representation exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought. In no case shall the board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with § 23-1390.

F. Within five days of receipt of such a petition, the agricultural employer may file a challenge to such petition on the ground that the authorization for the filing of such petition is not current or that such authorization has been obtained by fraud, misrepresentation or coercion. Such petition shall not act to stay the election proceeding but if it is there-

after determined that the authorizations are not current or obtained by fraud, misrepresentation or coercion the petition will be dismissed.

G. No election shall be directed or conducted in any bargaining unit or any subdivision thereof within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the board shall find are consistent with the purposes and provisions of this article in any election conducted within three months after the commencement of the strike. Any agricultural employee who is found to have sought or accepted employment only for the purpose of affecting the outcome of an election shall not be eligible to vote in an election conducted pursuant to the provisions of this article for a period of twelve months from the date of that election.

H. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the board.

I. The agricultural employer, within ten days after an election is directed by the board or a consent election agreement is approved by the board and on request of the board, shall furnish to the board a list of agricultural employees in the bargaining unit who are qualified to vote, and such a list shall be made available to the organizations or other interested employees involved in the election.

J. Upon the filing with the board, by thirty per cent or more of the agricultural employees in a bargaining unit covered by a certification or by an agreement between their employer and a labor organization made pursuant to § 23-1385, of a petition alleging the desire that such representation authority be rescinded, the board shall conduct an election by secret ballot of the employees in such unit and certify the results thereof to the labor organization and to the employer.

This section of the AERA is the threshold over which employees must pass if they desire to exercise their constitutional right to " . . . organize . . . take concerted action . . . through representatives of their own choosing. . . ."

If this section fails, the rest of the Act must fail, since most of the use of the Act would apply only if farm workers were initially free to organize and not if the exercise of such a constitutional freedom of assembly were made impossible.

Essentially, this provision of the Act must be found constitutionally invalid as being in violation of the First and Fourteenth Amendments to the Constitution, because of the excessive length of the procedures permitting delays of unit representation elections coupled with the seasonal nature of agricultural labor.

The constant flux of workers to job sites, the broken routines, the mobility and interchange with different employers, and the short span of working periods during peak employment periods when the majority of workers in a proposed unit are employed by a grower,

make it impossible for the Agricultural Employment Relations Board to conduct a timely election to effect the purpsoes of the Act.

Representation and recognition by the union, and the requirement that an employer bargain with the union, can only be achieved if the union is chosen to represent the employees through the election procedures set out in the A.R.S. § 23-1385(A)(5). Before an election can be held, the union must first demand and be denied recognition by the employer. A.R.S. § 23-1389(C)(1). There is no time set out in the law within which the employer must answer this request.

If the employer does not petition for an election, and denies a request for recognition, then the union must petition for an election showing that at least thirty percent of the employees in the unit wish to be represented by the union. A.R.S. § 23-1389(C)(1). If the AERA Board has reasonable cause to believe that a sufficient number of workers desire to have a union to represent them to justify an election, it will set a pre-election hearing. Again no time period is provided in the Act for how soon the Board must act. Since time for such notice is not provided, the general application of the Arizona Administrative Procedure Act stamps a twenty day period (A.R.S. § 41-1009) on how soon the hearing will be held.

If at the hearing, the Board determines there is a question of representation, it will direct an election by secret ballot. Again there is no provision setting the time within which the election must be held.

Once the Board has fixed the time for a union election, the employer has ten days to submit to the Board a list of his employees eligible to vote. A.R.S. § 23-1389(I). Then the election must be by secret ballot. If the union wins a majority of the votes cast, it will be certified by the Board as the representative for that unit and the employer will be required to bargain collectively with the union. § 23-1385(A)(5); see also § 23-1385(D).

The Board is directed by the AERA to form the unit from either all "permanent" employees, all "temporary" employees or both. A.R.S. § 23-1389(B). Permanent employees are defined as those "over sixteen years of age who . . . [have] . . . been employed by a particular agricultural employer for at least six months during the preceding calendar year." A.R.S. § 23-1382(1).

The Board is also directed to form the bargaining unit from employees "working at the farm." A worker could thus be a "permanent" employee but still be excluded from voting because while having worked for the employer for at "least six months during the preceding calendar year," he was not employed at the time of the election (and we take calendar year to have it plain meaning of being a year extending from January through December so that this provision clearly means that a worker must have been employed during the twelve months preceding January 1 of the year in which the election is held).

A temporary employee is defined as "over sixteen years of age . . . employed by a particular agricultural employer and who has been so employed during the preceding calendar year." A.R.S. § 23-1382(1).

Again, a worker not currently employed even though he worked the previous calendar year for the employer could not vote.

In any event, it is also clear from these provisions that many other migratory workers could not vote, even though presently employed, simply because they had not worked for the employer in a particular unit, either for six months or at any time during the preceding calendar year — the practical effect being that a particular worker must be employed during two successsive harvests before being entitled to vote.

These categories of employees eligible to vote set forth in the Act, would appear to be so defined as to preclude a significant and substantial number from participating in the collective bargaining process, from selecting representatives of their own choosing, given the migratory and transitory nature of agricultural employment.

A second and most significant consequence of determing the unit solely on the basis of the eligible employees as defined by the Act, is that an election in any unit will be a bar to another election for twelve months. A.R.S. § 23-1389(G).

Groups of workers may thus be hired for the same unit at different times of the year, and yet an election among one group will bar an election by a group hired later in the year. An employer could, for example, respond to a petiton for an election filed by a small

minority of his permanent, year-round employees, and if they should vote for no-union, then no matter how many hundreds of thousands of employees that employer hires for that unit, thereafter they are barred from holding another election for twelve months — clearly an absolute frustration of their right of free association.

Defendants have argued that even if an election were held before or after the peak period, the plaintiff union could object on the grounds that a non-representative electorate selected the collective bargaining representative. But here again, as if in anticipation of this kind of reaction, A.R.S. § 23-1385(B)(12) prohibits picketing or boycotting "(b) Where within the preceding twelve months a valid election under § 23-1389 has been conducted." or "(c) Where a petition has been filed under § 23-1389."

As noted in the earlier findings, another difficulty arising out of a procedure which makes an election (aside from dubious consent by an employer) the sole procedure for establishing union recognition and representation is that the ballot procedure is subject to disruption by the employer and thus could effectively frustrate any such recognition or representation ever being achieved.

This problem has been well recognized by the courts, and where an election is not a feasible alternative, the NLRA and the courts have recognized the validity of informal methods of designating a union for ordering collective bargaining and an essential method of preserving the rights of employees. *Linden Lumber Division v. UNLRB*, 419 U.S. 301, 95 S.Ct. 429, 42 L.Ed. 2d 465 (1974); *N.L.R.B. v. Gessel* [*sic*] *Packing*

Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed. 2d 547 (1969); *Bishop v. NLRB*, 502 F.2d 1024 (5th Cir. 1974); *NLRB v. Big Three Industires*, 497 F.2d 43 (5th Cir. 1974); *NLRB v. Kaiser Agr. Chem. Div. of Kaiser A & C Corp.*, 473 F.2d 374 (5th Cir. 1973); *J. P. Stevens & Co., Inc., Gubistan Division v. NLRB*, 441 F.2d 514 (5th Cir. 1971); *NLRB v. Drives Inc.*, 440 F.2d 354 (7th Cir. 1971).

The Ninth Circuit, in following *NLRB v. Gessel* [*sic*] *Packing Co., supra*, noted that without ultimate authority to order collective bargaining regardless of election results, the statutory procedures themselves become an aid to an employer's attempt to prevent unionization. *NLRB v. L.B. Forster Co.*, 418 F.2d 1 (9th Cir. 1969).

Thus the absence in the AERA of any feasible alternative to a secret ballot election is in effect a condonation and an encouragement to intentional interference by the employer in the election process which could effectively prevent any meaningful election from ever being held, again frustrating the right to free assembly and association.

We next consider additional bases for conferring jurisdiction upon this Court, namely, whether there is any other section or sections of the AERA that are constitutionally invalid on their face so that there is a further substantial federal question presented.

We find this to be true of three sections: A.R.S. § 23-1385(B)(8), A.R.S. § 23-1385(C), and A.R.S. § 23-1393(B).

CONSUMER PUBLICITY

The first deals with consumer publicity and reads in pertinent part:

§ 23-1385. *Unfair labor practices.*

B. It shall be an unfair labor practice for a labor organization or its agents:

8. To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and non-deceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name.

This provision of the AERA deals specifically with "truthful, honest and undeceptive publicity" and says if publicity is not of this character, it is an unfair labor practice. This section is no doubt intended to prohibit what is commonly referred to as consumer boycotts to be achieved by handbilling, picketing, orally, and other mediums of communication customarily employed by labor organizations.

First, it specifically prohibits inducing or encouraging an ultimate consumer to refrain from purchasing particular agricultural products "by the use of dishonest, untruthful and deceptive publicity." This section goes on to define permissible inducement "as truthful, honest, and nondeceptive publicity which indentifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute."

Plaintiff argues (1) that the section unconstitutionally restricts speech activity because it makes all but truthful, honest, and nondeceptive publicity an unfair labor practice, and subjects a person or organization guilty of such practice to criminal penalties for violation where determination of "truth" is left to be decided by a tribunal after the utterance and thus creates a drill [sic] on the exercise of First Amendment rights, and that (2) the section's limitation on inducement by a union to products produced by the agricultural employer with whom the union has a primary dispute restricts unconstitutionally the right of nonemployees to communicate.

As to the first requisite, the U.S. Supreme Court has held on many occasions that truthfulness is not a prerequisite to First Amendment protection.

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed. 2d 1 (1971), the court said:

> It is elementary of course that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. *Under Near v. Minnesota*, 283 U.S. 697, the injunction, so far as it poses a prior restraint on speech and

> publication constitutes an impermissible restraint on first amendment rights.

Again in *N. Y. Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964), the court also indicated that First Amendment protections apply to other than just truthful statements.

> Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth — whether administered by judges, juries or administrative officials — and especially one that puts the burden on proving the truth to the speaker. *Cf. Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 525-26, 2 L.Ed. 2d 1460, 1472 (1958). The constitutional protection does not turn upon the "truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963).
>
> That erroneous statement is inevitable in free debate and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need to survive" (citing case) was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney v. Paterson*, 76 U.S. App. D.C. 23, 24, 128 F.2d 457, 458, cert. denied 317 U.S. 678, 63 S.Ct. 160, 87 L.Ed. 544 (1942).

See also *Vanesco v. Schwartz*, 401 F.Supp. 87 (D.C.N.Y. 1975), aff'd without opinion 423 U.S 1041, 96 S.Ct. 763 (1976). The court in *Vanesco* held that a statute prohibiting "deliberate misrepresentations" and regulations prohibiting "misrepresentations" in political campaigns, which on the face of the statute

were not based on a finding of actual malice, was an overbroad infringement upon First Amendment rights and was unconstitutional on its face.

The statute here involved likewise contains no intent requirement, and in fact is even broader since it is not limited to "deliberate" misrepresentation.

Although defendants, as to this particular provision and with so many others, are always proposing the narrowest interpretation possible, and suggesting that this is the way that this, and many other provisions, should be interpreted to save constitutionality of a statute, yet, as has been said, where First Amendment rights are involved, this prohibition in this section of the statute involving as it does a prior restraint on free speech, must be narrowly drawn, and the speaker should not be "chilled" by the potential that some interpretation of his expression concerning which he has no knowledge may make his statement "untruthful." *Gooding v. Wilson,* 405 U.S. 518, 92 S.Ct. 1003, 31 L.Ed. 408 (1972); *Pickering v. Board of Education,* 391 U.S. 563, 573-74, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968); *Garrison v. Louisiana,* 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed. 2d 125 (1964); *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963) *Cafeteria Workers Local 302 v. Angelos,* 320 U.S. 293, 295, 64 S.Ct. 126, 88 L.Ed. 58 (1943); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); *Cantwell v. Connecticut,* 310 U.S. 296, 310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

The next questionable part of this section, namely, A.R.S. § 23 1385(B)(8), is that which limits consumer picketing by the union solely to situtations in which the union has a primary dispute with a particular

grower and the picket signs must identify that grower. However, if that particular grower with whom the union has a primary dispute sells to a trade association which utilizes a trade name on the products sold which include the particular grower's product, the union is forbidden in its consumer picketing from referring to that trade name.

Defendants argue that this language is necessary to protect a grower not involved in a dispute with the union who happens to deal in the same product bearing the same trade name, as the grower with whom the union does have a dispute.

However, it must be noted that A.R.S. § 23-1382.6 is the only definition of "dispute," and it is there defined as "... any controversy between an agricultural employer and his agricultural employees...." Construing A.R.S. § 1385(B)(8) in light of A.R.S. § 23-1382.6 means that a labor organization is permitted to conduct picketing against a particular employer only if that employer's employees have a controversy over terms and conditions of employment.

In *AFL v. Swing,* 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1941), the Illinois Supreme Court had enjoined picketing by a labor union on the ground that there was no dispute between the employer and his immediate employees. The United States Supreme Court reversed, however, holding that an injunction was inconsistent with "the right to free discussion" and therefore unconstitutional. It follows that if a primary dispute is not required for primary picketing, it cannot be made a requirement for secondary picketing. The same "right to free discussion" is abridged, and it is not outweighed by the State's interest in pro-

tecting the secondary employer since the existence of a primary dispute has no relation to whether the secondary employer is being subjected to economic coercion. See also: *Baldwin v. Arizona Flame Restraurant*, 82 Ariz. 385, 313 P.2d 759 (1957), where the Arizona Supreme Court held unconstitutional A.R.S. § 23-1322 which required a "bona fide dispute regarding wages and working conditions" between an employer and a majority of his employees as a prerequisite to lawful picketing. See also: *NLRB v. Fruit Packers Local 760*, 377 U.S. 58, 84 S.Ct. 1063, 12 L.Ed. 2d 129 (1964).

This section of A.R.S. § 23-1385(B)(8) therefore is invalid on its face as a violation of the free speech provison of the First Amendment to the Constitution.

ACCESS BY UNION REPRESENTATIVES

Turning next to a consideration of § 23-1385(C) which in pertinent part reads as follows:

> C. . . . No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information *time*, or *facilities* (emphasis added) to enable such employer or labor organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters, or adherents.

This provision clearly states that an employer of migrant farm workers does not have to provide a time or place when and where the union can communicate with his workers, and it also means that the employer does not have to allow the union to come upon his

property. The provision provides a positive tool for a grower employer to keep any one and everyone away from his property.

Given the fact, as shown by testimony and other evidence and really not disputed by defendants that the vast majority of farm workers are migratory and generally reside in areas or labor camps located on property owned by the employer, this section must fall because it constitutes an unconstitutional restriction on the First Amendment exercise of free speech because of private property interests.

Even defendants agree that there must be an accommodation between organizational rights and property rights by citing *Central Hardware Co. v. NLRB*, 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed. 2d 122 (1972), but no such accommodation is permitted by this section of the statute.

Beginning with *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), which held that ownership of property didn't always mean absolute domain and that private property was *not* per se immune from a constitutional protection of people on or entering upon property, the courts continued to assert this same principle.

In *Peterson v. Talisman Sugar Co.*, 478 F.2d 73 (5th Cir. 1973), the court found that a labor camp was more analagous to the traditional "company town" than shopping centers discussed in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed. 2d 603 (1971); *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed. 2d 196

(1976); and *Lloyd Corp. v. Tanner,* 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed. 2d 131 (1971) relied upon by defendants.

In the latter cases, the Supreme Court upheld restrictions on exercise of First Amendment rights because of private property interests.

In the company town situation, pertinent to the facts of this case, the court in *Marsh v. Alabama, supra,* found that there was nothing in the company town, except for mere title in a corporation, which would justify treating it differently from any other municipal center.

The court in *Peterson v. Talisman Sugar Co., supra,* went on to hold that a labor camp was a functional equivalent of a municipality and the company had to accommodate its property rights to the extent necessary to allow the free flow of ideas and information between the union and the migrant workers. See also: *Illinois Migrant Council v. Campbell Soup Co.,* 478 F.2d 73, 82-83 (5th Cir. 1973); *United Farm Workers Union, AFL-CIO v. Mel Finerman Co.,* 364 F.Supp. 326 (D.Colo. 1973); *Francheschina v. Morgan,* 346 F.Supp. 833 (S.D. Ind. 1972); *Folgueras v. Hassle,* 331 F.Supp. 615 (W.D. Mich. 1971); "First Amendment and the Problems of Access to Migrant Labor Camps After Lloyd Corporation v. Tanner," 61 Cornell L.Rev. 560 (1976).

Defendants argue that this section makes no reference to and does not restrict the rights of employees to communicate with other employees during non-work time in non-work areas, and that the section restricts only labor organizations. They say this section doesn't deny access, it just says that the employer doesn't

have to furnish facilities and the union "is not prohibited, in the exercise of free speech, from going into non-work areas on the property at reasonable times for legitimate, peaceful purposes."

However, as to alternative means of communciation, A.R.S. § 23-1389(I) provides that an employer need only provide a list of names of the people working for him, and this, taken in conjunction with A.R.S § 23-1385(C)'s provision which states that no employer shall be required to furnish or make available information to enable a union to communicate with employees, effectively deprives the union of any alternative form of communication due to the migrant nature of the workers.

Defendants also attempt to make a distinction between "furnishing" and "denying access." They seem to argue that these are always two separate acts, one an affirmative and the other negative, and that the Act only applies to one, namely "furnishing." In fact they would appear to be the same activity. If the grower doesn't have to "furnish facilities" that clearly means he doesn't have to provide a time or place when the union can communicate with his workers, and thus also means that he does not have to allow them to come onto his property.

Defendants also seek to distinguish between employee and non-employee union organizers, contending that the former has rights of access while the latter does not. Aside from the dubious value of this distinction in constitutional terms, the words of the statute are not so limited and an employee who is a union organizer is considered under normal agency principles to be an agent of the union, and the employer would

not be under any obligation to allow time or facilities for him either.

In brief then, an employer does not have to grant access to facilities which he does not have to furnish.

Given the clearly established rights of communication and organization, this section of A.R.S. § 23-1385(C) is constitutionally defective because it prohibits too broad a scope of activity, both protected and unprotected, involving freedom of association and speech.

COURT JURISDICTION

We turn finally to A.R.S. § 23-1393(B) which in pertinent part reads:

§ 23-1393. *Court jurisdiction*

. . .

. . .

B. In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues. Any agricultural employer shall be entitled to injunctive relief accorded by Rule 65 of the Arizona Rules of Civil Procedure upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities. For the purpose of this subsection, an agricultural commodity or commodities for human consumption with a market value of five thousand dollars or more shall constitute commercial quantities.

This section provides a unique remedy to the employer. On his verified petition to the Court, alleging that his employees are unlawfully on strike and alleging a prevention of production or loss or spoilage of his crop, several things happen:

1. As a condition for the order he, the employer, must "agree" to submit the issues to binding arbitration;

2. If the parties within two days after the issuance of the order cannot agree upon an arbitrator to decide the issues, the Court *"shall"* appoint one "to decide the unresolved issues."

The effect of the section is apparent, if the union should insist under the "employees' rights" section (A.R.S. § 23-1383) that they have a right to bargain concerning an issue which is contrary to that of the employer's position under the "management rights" sections (A.R.S. §§ 23-1384, 23-1385(B)(11), 23-1385(D), then any resultant strike by the union in support of their position can be unilaterally deemed "unlawful" by the employer who can, without the consent of the union, submit the dispute to binding

arbitration by an outsider. The act then mandates the Court to submit the matter to a stranger and deprives the Court of further jurisdiction to hear the matter on its merits.

Such unilateral compulsory arbitration constitutes a clear denial of due process under the law for when the effect of statutes has been to coerce parties to submit to arbitration, without agreement or assent on their part to do so, the courts have declared them unconstitutional [*Dorchy v. Kansas*, 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686 (1924); *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 (1923); *Graves v. Northern P. R. Co.*, 5 Mont. 556, 6 P. 16 (1885)] as depriving parties of liberty and property without due process of law, 55 A.L.R. 2d 445, 510, or as depriving parties of constitutional right to a trial by jury. *Re Smith*. 381 Pa. 223, 112 A.2d 625, app. dismissed, 350 U.S. 858, 76 S.Ct. 105, 100 L.Ed. 762 (1955).

Furthermore, under Arizona law pertaining to arbitration which contains procedures for arbitration and means of review, § 12-1517 makes such article to have "... no application to arbitration agreements between employers and employees or their respective representatives."

We therefore strike down this section of the statute, A.R.S. § 23-1393(B), as unconstitutional in violation of the due process clause of the Fourteenth Amendment to the Constitution and the Seventh Amendment providing for right to trial by jury.

CONCLUSION

To conclude, we find that the fatal flaw in the Arizona Agricultural Employment Relations Act consists of the inability of agricultural employees to organize in the first instance to exercise their right of freedom of speech and assembly, as we indicated in striking down A.R.S. § 23-1389.

This, coupled with the other sections struck down, results in a complete perversion of the expressed intent of the Legislature to allow agricultural employees to "be free to organize, take concerted action and, through representatives of their own choosing, enter into collective bargaining agreements establishing their wages and terms and conditions of employement. . . ."

The limitation on this right to organize is frustrated by legislated delay, the inability to communicate with employees at the employer's facilities, the unlawful proscription on free speech, the right to concerted action in the form of a lawful strike clearly threatened by the employer's unilateral action in having the issue determined by a stranger through compulsory arbitration which in turn takes away the right to a trial by jury, and finally by the imposition of vauge and ambiguous criminal sanctions. In the light of these rulings there is obviously no need to rule on plaintiffs' other contentions including the claimed equal protection violation.

In light of the findings of this Court,

IT IS ORDERED that a permanent injunction shall issue enjoining defendants from applying or enforcing any of the provisions of A.R.S. § 23-1381, et seq.

DATED this 20th day of March, 1978.

United States Circuit Judge

United States District Judge

United States District Judge

CRAIG, D. J. concurring:

In this case I would have preferred to invoke the doctrine of abstention in order that the Supreme Court of Arizona might first express its opinion with respect to the constitutionality of a law established by the Arizona State Legislature. The majority has elected to consider the case on its merits.

I, therefore, concur in the result, although I would have used fewer words to reach it.

DATED this 19th day of April, 1978.

United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

UNITED FARM WORKERS NATIONAL UNION on behalf of itself and its members, et al., *Plaintiffs,* vs. BRUCE BABBITT, Governor of the State of Arizona, et al., *Defendants,* ARIZONA FARM BUREAU FEDERATION, an Arizona corporation, et al., *Intervenors.*	NO. CIV 72-445 PHX CAM JUDGMENT

This action came on for trial before the court, the Honorable John F. Kilkenny, Circuit Judge; the Honorable Walter E. Craig, District Judge; and the Honorable C. A. Muecke, District Judge, presiding, and the pleadings and memoranda having been considered and the issues having been duly heard and a decision having been duly rendered, and

The Court having found that the Agricultural Employment Relations Act, A.R.S. §22-1381, et sequence, is unconstitutional in its entirety for the reason that A.R.S. §§23-1385(B)(8), 23-1392, 23-1393(B)(1) are unconstitutional and void on their face, and A.R.S. §§23-1385(C) and 23-1389 are likewise unconstitutional when considered in context with the testimony and other evidence presented, and these sections hav-

ing been found to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and in violation of the freedom of speech and assembly provisions and of the due process and equal protection clauses with A.R.S. §23-1393(B) also found to be in violation of the Seventh Amendment providing for right to trial by jury and with the rest of the Act falling by reason of its inseparability and inoperability apart from the provisions found to be invalid,

IT IS THEREFORE ORDERED that judgment is hereby rendered in favor of plaintiffs herein in accordance with the opinion of the Court and a permanent injunction is hereby entered preventing enforcement by defendants herein of A.R.S. §§23-1381, et seq.

DATED this 19th day of April 1978.

_____
United States Circuit Judge

_____
United States District Judge

_____
United States District Judge

APPENDIX C

JOHN A. LaSOTA, JR.
The Attorney General

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

UNITED FARM WORKERS NATIONAL UNION on behalf of itself and its members, et al., *Plaintiffs,* vs. BRUCE BABBITT, Governor of the State of Arizona, et al., *Defendants,* ARIZONA FARM BUREAU FEDERATION, an Arizona corporation, et al., *Intervenors.*	NO. CIV 72-445 PHX CAM NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Defendants, Bruce Babbitt, Governor of the State of Arizona; Jack LaSota, Jr., Attorney General of the State of Arizona; Bart Fleming, Treasurer of the State of Arizona; Raymond Long, Finance Commissioner of the State of Arizona; Gene Blake, William S. Boice, Jack Montgomery, Keith Walton, Jack McManus, and Milton G. Sanders, individually and as members of the Arizona Agricultural Relations Board; and Theresa Bond, in

her capacity as Executive Secretary of the Arizona[1] Farm Bureau Federation, an Arizona corporation; Arizona Grape Growers Association, an Arizona corporation; and the Yuma Citrus Shipper's Association, an unincorporated association, hereby appeal to the Supreme Court of the United States from the Judgment of this Court in this case entered on April 20, 1978.

This appeal is taken pursuant to 28 U.S.C. §1253.

DATED this 13th day of June, 1978.

Respectfully submitted,

JOHN A. LASOTA, JR.
The Attorney General

By: /s/ Richmond K. Turner
Assistant Attorney General
Attorney for Defendants

JENNINGS, STROUSS & SALMON

By: /s/ Jon L. Kyl
Charles E. Jones
Jon L. Kyl
John B. Weldon, Jr.
Attorneys for Intervenors

[1]Due to an inadvertent typographical error the following line was omitted from the Notice of Appeal: "Agricultural Employment Relations Board; and the Intervenors, the Arizona".

CERTIFICATE OF SERVICE

I, John A. LaSota, Jr., caused to be served a copy of the Notice of Appeal upon counsel for the Plaintiffs, as required by Rule 33 of the U.S. Supreme Court rules, by depositing a copy of said Notice of Appeal in the United States Post Office with first class postage prepaid and addressed to counsel of record for the Plaintiffs at:

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Attorney for Defendants

APPENDIX D

ARTICLE 5. AGRICULTURAL EMPLOYMENT RELATIONS

Article 5, consisting of sections 23-1381 to 23-1395, was added by Laws 1972, Ch. 137, § 1, effective August 13, 1972.

§ 23-1381. *Declaration of policy*

It is hereby declared to be the policy of this state that the uninterrupted production, packing, processing, transporting, and marketing of agricultural products is vital to the public interest. It is also declared to be the policy of this state that agricultural employees shall be free to organize, to take concerted action, and through representatives of their own choosing enter into collective bargaining contracts establishing their wages and terms and conditions of employment; or to refrain from engaging in any or all such activities. It is further declared that there now exists an inequality of bargaining power between agricultural employers and labor unions, arising out of the seasonable character and perishable nature of such agricultural products, the mobility of agricultural labor, and the fundamental differences between agriculture and industry. While the right to strike is a basic right of organized labor, such right must take into account the perishable character and the seasonal nature of agricultural products and must be limited and regulated accordingly. It is the intent of the legislature to provide a means to bargain collectively which is fair and equitable to agricultural employers, labor organizations and employees; to provide orderly election procedures to resolve questions concerning representation of agricultural employees and to declare

that certain acts are unfair labor practices which are prohibited and subject to control by the police power of this state. The overriding special interest of the state of Arizona with respect to certain secondary boycott activities originating in this state, but extending across state lines and directed at employers in other states, must be recognized, and such acts must be made unlawful and subject to control by the police power of this state.

§ 23-1382. *Definitions*

In this article, unless the context otherwise requires:

1. "Agricultural employee, permanent" means any employee over sixteen years of age who has been employed by a particular agricultural employer for at least six months during the preceding calendar year, engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field. "Agricultural employee, temporary" means any employee over sixteen years of age who is employed by a particular agricultural employer and who has been so employed during the preceeding calendar year, engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field. If otherwise qualified, a person shall be considered an agricultural employee if an agricultural employer pays the wages of the employee for work performed for the employer's benefit or on his behalf, even though the supervision of the employee, the bookkeeping, and the issuance of payroll checks is by a person other than the employer. In calculating a work day of an agricultural employee, one hour or more of employment in any one day shall be considered a work day. "Agricultural employee" also includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. "Agricultural employee" does not include any individual:

(a) Employed by his parent, spouse or by an immediate relative.

(b) Having the status of an independent contractor.

(c) Employed as a supervisor or in a confidential capacity or as a clerical employee or as a guard.

(d) Employed as an executive, professional or technical employee.

(e) Who has quit or has been discharged for cause.

(f) Who is a tenant or a sharecropper and reasonably directs or shares in the management of an enterprise engaged in agriculture.

(g) Engaged in hauling or stitching functions.

2. "Agricultural employer" means any employer engaged in agriculture who employed six or more agricultural employees for a period of thirty days during the preceding six-month period, and includes any person who provides labor and services on one or more farms as an independent contractor if such person, for a period of thirty days during the preceding six-month period, employed six or more employees in such work. In calculating the number of agricultural employees employed by an agricultural employer or provided by an independent contractor, one hour or more of employment in any one day shall be considered a day of

work. "Agricultural employer" also includes any employer, engaged in agriculture with less than six agricultural employees, who voluntarily elects to be subject to this article by filing a request in writing with the board.

3. "Agriculture" means all services performed on a farm as defined and described in § 23-603, including, but not limited to, the recruiting, housing and feeding of persons employed or to be employed as agricultural employees by agricultural employers.

4. "Board" means the agricultural employment relations board.

5. "Farm" means any enterprise engaged in agriculture which is operated from one headquarters where the utilization of labor and equipment is directed and which, if consisting of separate tracts of land, such tracts are located within a fifty mile radius of such headquarters.

6. "Labor dispute" means any controversy between an agricultural employer and his agricultural employees or their representative concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment.

7. "Labor organization" means any organization or any agency defined and described in §§ 23-1301 and 23-1321.

8. "Person" means one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy or receivers.

9. "Professional employee" means:

(a) Any employee engaged in agricultural work that:

(i) Is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work,

(ii) Involves the consistent exercise of discretion and judgment in its performance,

(iii) Is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, or

(iv) Requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning.

(b) Any employee who has completed the course or courses of specialized intellectual instruction and study described in subdivision (a), item (iv), and is performing such work, or is performing such work or related work under the supervision of a professional person while acquiring such specialized instruction.

10. "Representative" means any individual or labor organization.

11. "Supervisor" means any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if such authority requires the use of independent judgment.

12. "Ultimate consumer" means the person who purchases an agricultural product for consumption.

13. "Unfair labor practice" means any unfair labor practice listed in § 23-1385.

23-1383. *Rights of employees*

A. Agricultural employees shall have the right to self-organization, to bargain directly for themselves, and to form and join or assist labor organizations to bargain collectively through representatives of their own free choosing, or to engage in lawful concerted activity for the purpose of collective bargaining or other mutual aid or protection, and each such employee shall have the right, without interference from any source, to refrain from any and all of such activities.

B. Agricultural employees shall also have those rights more particularly defined and described in articles 1 and 3 of this chapter, and shall be protected from the practices described in article 4 of this chapter.

§ 23-1384. *Rights of employer*

A. An agricultural employer shall have the following management rights:

1. To manage, control and conduct his operations, including, but not limited to, the number of farms

and their locations, methods of carrying on any operation or practices thereon, kinds of crops, time of work, size and make-up of crews, assignment of work, and places of work.

2. To hire, suspend, discharge or transfer employees in accordance with his judgment of their ability.

3. To determine the type of equipment or machinery to be used, the standards and quality of work, and the wages, hours and conditions of work. The terms of employment relating to wages, hours, conditions of work, and matters of worker safety, sanitation, health and the establishment of grievance procedures directly relating to a job shall be subject to negotiation.

4. To work on his own farm in any capacity at any time.

5. To join or refuse to join any labor organization or employer organization.

§ 23-1385. *Unfair labor practices*

A. It shall be an unfair labor practice for an agricultural employer:

1. To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 23-1383 and articles 1 and 3 of this chapter,[1] or to violate the protection of employees from the practices described in article 4 of this chapter.[2]

2. To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. An agricultural employer shall not be prohibited from permitting

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[1]Sections 23-1381 et seq. and 23-1341 et seq.

[2]Section 23-1361.

employees to confer with him during working hours without loss of time or pay.

3. By discrimination in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

4. To discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this article.

5. To refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 23-1389. Nothing in this article shall be construed as requiring an agricultural employer to bargain collectively until a representative of his agricultural employees has been determined by means of a valid secret ballot election.

6. To discharge or otherwise discriminate against any person because he has filed charges or given testimony before the board or a court.

7. To threaten to have discharged any agricultural employee, or threaten to have reduced wages of any agricultural employees, solely because of any labor activity.

B. It shall be an unfair labor practice for a labor organization or its agents:

1. To impose any economic sanction or to restrain or coerce agricultural employees in the exercise of their rights or to coerce or intimidate any employee in the enjoyment of his legal rights provided by this article, or to intimidate his family, picket his domicile or injure the person or property of any employee or his family. This paragraph shall not impair the

right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.

2. To threaten or impose any economic sanction or reprisal against any person not a member of the labor organization in the exercise of rights under this article, including but not limited to the right to refrain from any or all concerted activity, or against any person, not a member thereof, who refrains from compliance with a union rule, policy, or practice which establishes or affects wages, hours, or working conditions at such person's place of employment.

3. To restrain, coerce, or threaten or impose any fine or other economic sanction against any person who invokes the processes of the board, or the court, or against an agricultural employer or employee in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

4. To refuse to bargain collectively with an agricultural employer, provided it is the majority representative of his agricultural employees as determined pursuant to § 23-1389.

5. To cause or attempt to cause an agricultural employer:

(a) To pay or deliver or agree to pay or deliver any money or other thing of value for services which are not performed or are not to be performed.

(b) To establish or alter the number of employees to be employed or the assignment thereof.

(c) To assign work to the employees of a particular employer.

(d) To discriminate in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Nothing in this paragraph shall prohibit agreements between labor organizations and agricultural employers which regulate hiring and tenure of employment on the basis of seniority; provided further that the labor organization is not given power to determine seniority unilaterally.

6. To engage in a secondary boycott as defined in § 23-1321.

7. To induce or encourage or threaten, restrain or coerce any secondary employer or any executive or management employee of any secondary employer to make a management decision not to handle, transport, process, pack, sell or distribute any agricultural commodity of an agricultural employer with whom a labor dispute exists.

8. To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name

which may include agricultural products of another producer or user of such trademark, trade name or generic name.

9. To restrain, coerce or threaten an ultimate consumer to prevent him from purchasing, consuming or using such agricultural product.

10. To threaten or engage in arson, libel, slander, injury to person or property or other violent conduct when the objective is to prevent the preparing for market, transporting, handling, displaying for sale, or selling of any agricultural product.

11. To intimidate, restrain, or coerce agricultural employers in the exercise of the rights guaranteed by § 23-1384.

12. To picket or cause to be picketed, boycott or cause to be boycotted, or threaten to boycott or picket, or cause to be boycotted or picketed, any agricultural employer when the objective is to induce, encourage, force or require an agricultural employer to recognize or bargain with a labor organization as the representative of his agricultural employees, or the agricultural employees of an agricultural employer to accept or select such labor organization as their collective bargaining representative unless such labor organization is currently certified as the representative of such employees:

(a) Where the agricultural employer has lawfully recognized in accordance with this article any other labor organization and a question concerning representation may not appropriately be raised under § 23-1389.

(b) Where within the preceding twelve months a valid election under § 23-1389 has been conducted.

(c) Where a petition has been filed under § 23-1389.

13. To call a strike unless a majority of the employees within the bargaining unit has first approved the calling of such a strike by secret ballot.

C. The expressing of any views, argument, opinion or the making of any statement, including expressions intended to influence the outcome of an organizing campaign, a bargaining controversy, a strike, lockout or other labor dispute, or the dissemination of such views whether in written, printed, graphic, visual or auditory form, if such expression contains no threat of reprisal or force or promise of benefit, shall not constitute or be evidence of an unfair labor practice or constitute grounds for, or evidence justifying, setting aside the results of any election conducted under any of the provisions of this article. A statement of fact by either a labor organization or an agricultural employer relating to existing or proposed operations of the employer or to existing or proposed terms, tenure, or conditions of employment with the employer shall not be considered to constitute a threat of reprisal or force or promise of benefit. No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time, or facilities to enable such employer or labor

organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters, or adherents.

D. For the purposes of this section, to "bargain collectively" is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment which directly affect the work of employees, or the negotiation of an agreement, or to resolve any question arising thereunder. To "bargain collectively" includes the furnishing of necessary and relevant information in connection with the negotiation of an agreement or any issue arising under such agreement, or requiring as a condition for entering into an agreement the execution of a written contract incorporating any agreement reached if requested by either party. The failure or refusal of either party to agree to a proposal, or to the making, changing or withdrawing of a lawful proposal, or the making of a concession shall not constitute, or be evidence, direct or indirect, of a breach of this obligation. The board in any remedial order shall not direct either party to make any concession or agree to any proposal or to make any payment of money except to employees who are reinstated with back pay as provided in § 23-1390. This section shall not require any agricultural employer to bargain collectively with respect to any management rights. "Management rights", as used in this subsection, include but are not limited to the right to discontinue the entire farming operation or any part thereof, to contract out any part of the work thereof not covered

by a labor contract, to sell or lease any of the real or personal property involved therein, or to determine the methods, equipment and facilities to be used in producing agricultural products or the agricultural products to be produced.

E. Where there is in effect a collective bargaining contract covering agricultural employees, the duty to bargain collectively also means that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification:

1. Serves a written notice upon the other party to the contract of the proposed termination or modification not less than sixty days prior to the expiration date thereof, or if such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification.

2. Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications.

3. Continues the contract in full force and effect without resorting to a strike or lockout for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

F. The duties imposed upon agricultural employers, agricultural employees, and labor organizations shall become inapplicable upon an intervening certification of the board, under which the labor organization or individual which is a party to the contract has been superseded as or ceased to be the representative of the employees subject to the provisions of § 23-1389, and

the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any agricultural employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an agricultural employee of the agricultural employer engaged in the particular labor dispute for the purposes of §§ 23-1385, 23-1389 and 23-1390, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

§ 23-1386. *Agricultural employment relations board; members; terms; appointment*

A. There is established an agricultural employment relations board which consists of seven members.

B. The members of the board shall be appointed by the governor. Two of the members shall be appointed as representatives of agriculture employers, two of the members appointed shall be representatives of organized agricultural labor and the three additional members, one of whom shall be the chairman of the board, shall be appointed as representatives of the general public. The term of office of the members shall be five years. Upon the initial appointment, one of the labor representatives shall be appointed for a term of one year, one of the representatives of the general public shall be appointed for a term of one year, one of the agricultural representatives shall be appointed for a term of two years, one of the representatives of the general public shall be appointed for a term of two years, one of the agricultural representatives shall be

appointed for a term of three years, one of the labor representatives shall be appointed for a term of four years and one of the public members of the board shall be appointed for a term of five years. Any individual appointed to fill a vacancy of any member shall be appointed only for the unexpired portion of the term of the member he is succeeding. Members of the board may be removed from office by the governor upon notice and hearing for neglect of duty or malfeasance in office, but for no other cause.

C. Two alternate members shall be appointed to the board by the governor. One of the alternates shall be appointed as a representative of organized agricultural labor and the other as a representative of agriculture. Alternates shall be appointed for terms of five years. Any individual appointed to fill a vacancy of any alternate shall be appointed only for the unexpired portion of the term of the alternate he is succeeding. Alternates may be removed from office by the governor upon notice and hearing for neglect of duty or malfeasance in office, but for no other cause. No alternate shall participate in deliberations of the board except in the absence of a board member representing his area of interest.

D. There shall be a general counsel of the board who shall be appointed by the governor. The general counsel shall be the exclusive legal representative of the board, shall have final authority, on behalf of the board, with respect to the investigation of charges and the issuance of complaints under § 23-1390 and with respect to the prosecution of such complaints by the board, and shall have such other duties as the board may prescribe or as may be provided by law. The general counsel shall appoint such assistants as shall be needed to carry out the work of the office.

E. A vacancy on the board shall not impair the right of the remaining members to exercise all of the powers of the board and four members shall at all times constitute a quorum of the board. The board shall have an official seal which shall be judicially recognized.

F. The principal office of the board shall be in the city of Phoenix, but it may meet and exercise any or all of its powers at any other place.

G. The board may meet in executive session upon the decision of a majority of the members of the board.

H. Meetings of the board may be called by the chairman or by a majority of the members of the board by giving written notice to the chairman who shall notify all the members of the board as to time and place of the board meeting.

§ 23-1387. *Powers and duties*

A. The board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the state. A member of the board who participates in any such inquiry shall not be disqualified from subsequently participating in a decision of the board in the same case.

B. The board shall make and may from time to time amend and rescind, in the manner prescribed by law, such rules and regulations as may be necessary to carry out the provisions of this article.

C. The board may also establish offices in such other cities as it shall deem necessary and shall determine the region to be served by such offices. The board may delegate to the heads of these offices as it deems appropriate its powers under § 23-1389, to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, to determine whether a question of representation exists and to direct an election by a secret ballot and certify the results of such election within ten days. The board may review any action taken pursuant to the authority delegated under this subsection by any regional officer upon a request for a review of such action filed with the board by any interested party. Any such review made by the board shall not, unless specifically ordered by the board, operate as a stay of any action taken by the regional officer. The entire record considered by the board in considering or acting upon any such request or review shall be made available to all parties prior to such consideration or action, and the board's findings and action thereon shall be published as a decision of the board.

§ 23-1388. *Officers and employees of the board*

A. The board shall have authority to appoint an executive secretary and such attorneys, hearing officers, trial examiners and other employees as it may from time to time find necessary for the proper performance of its duties. Compensation for all such personnel shall be as determined pursuant to § 38-611.

B. The board may not employ any attorney for the purpose of reviewing transcripts of hearings or preparing drafts of opinions, except that any attorney employed for assignment as a legal assistant to any

board member may for such board member review such transcripts and prepare such drafts.

C. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the board or his legal assistant, and no trial examiner shall advise or consult with the board with respect to exceptions taken to his findings, rulings or recommendations.

D. Attorneys appointed under this section may, at the discretion of the board, appear for and represent the board in any case in court.

§ 23-1389. *Representatives and elections*

A. Representatives selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in a unit appropriate for such purposes shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. If ratification of any such contract is required, the right to vote in such ratification shall be limited to the employees in the bargaining unit. Any individual agricultural employee or a group of agricultural employees may at any time present grievances to their agricultural employer and have such grievances adjusted, without the intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect. The bargaining representative shall be given opportunity to be present at such adjustment.

B. The board shall decide in each case whether in order to ensure to employees the fullest freedom in exercising their rights the unit appropriate for the purposes of collective bargaining shall consist of either all temporary agricultural employees or all permanent agricultural employees of an agricultural employer working at the farm where such employer grows or produces agricultural products or both. In making unit determinations the extent of a union's extent of organization shall not be controlling. Principal factors should be the community of interest between employees, same hours, duties and compensation, the administrative structure of the employer and control of labor relations policies.

C. The board shall investigate any petition, and if it has reasonable cause to believe that a question of representation exists shall provide for an appropriate hearing upon due notice, when such petition has been filed in good faith in accordance with such regulations as may be prescribed by the board:

1. By an agricultural employee or group of agricultural employees or any individual or labor organization acting in their behalf alleging that thirty per cent or more of the number of agricultural employees in the unit in question either wish to be represented for collective bargaining and that their employer declines to recognize their representative or assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative is no longer a representative.

2. By an agricultural employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative or that an individual or labor organization which has previously been certified as the bargaining representative is no longer a representative.

D. If the board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. If a second labor organization files a petition for an election alleging that thirty per cent or more of the employees in the unit in question desire to be represented by that labor organization, then the board shall require that the names of both labor organizations shall appear on the ballot. In any election the voters shall be afforded the choice of "no union". If in a representational election where more than one union is on the ballot, and none of the choices receives a majority vote, a second election shall be held. The second election shall be between the union receiving the highest number of votes and "no union". In any election a labor organization shall obtain a majority of all votes cast in that election in order to be certified as the bargaining representative of all the employees in that unit.

E. In determining whether or not a question of representation exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought. In no case shall the board deny a labor organization a

place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with § 23-1390.

F. Within five days of receipt of such a petition, the agricultural employer may file a challenge to such petition on the ground that the authorization for the filing of such petition is not current or that such authorization has been obtained by fraud, misrepresentation or coercion. Such petition shall not act to stay the election proceeding but if it is thereafter determined that the authorizations are not current or obtained by fraud, misrepresentation or coercion the petition will be dismissed.

G. No election shall be directed or conducted in any bargaining unit or any subdivision thereof within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the board shall find are consistent with the purposes and provisions of this article in any election conducted within three months after the commencement of the strike. Any agricultural employee who is found to have sought or accepted employment only for the purpose of affecting the outcome of an election shall not be eligible to vote in an election conducted pursuant to the provisions of this article for a period of twelve months from the date of that election.

H. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the board.

I. The agricultural employer, within ten days after an election is directed by the board or a consent election agreement is approved by the board and on request of the board, shall furnish to the board a list of agricultural employees in the bargaining unit who are qualified to vote, and such a list shall be made available to the organizations or other interested employees involved in the election.

J. Upon the filing with the board, by thirty per cent or more of the agricultural employees in a bargaining unit covered by a certification or by an agreement between their employer and a labor organization made pursuant to § 23-1385, of a petition alleging the desire that such representation authority be rescinded, the board shall conduct an election by secret ballot of the employees in such unit and certify the results thereof to the labor organization and to the employer.

§ 23-1390. *Prevention of unfair labor practices*

A. The board may, as provided in this section, prevent any person from engaging in any unfair labor practice.

B. When it is charged that any person has engaged in or is engaging in any such unfair labor practice, the board, or any agent or agency designated by the board for such purposes, may issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of such complaint. No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy

thereof upon the person against whom such charge is made, unless the person so aggrieved was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the board or the member, agent, or agency conducting the hearing, any other person may be allowed to intervene in the proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the superior courts of the state under the rules of civil procedure applicable to such courts. All proceedings shall be reported by a phonographic or magnetic tape recorder.

C. The testimony taken by the board or such member, agent, or agency shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the board determines that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take

such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this article. Where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. Such order may further require such person to make reports from time to time showing the extent to which he has complied with the order. If upon the preponderance of the testimony taken the board determines that the person named in the complaint has not engaged in or is not engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue an order dismissing the complaint. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. If the evidence is presented before a member of the board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the board may authorize, such recommended order shall become the order of the board and become effective as therein prescribed.

D. Until the record in a case is filed in a court, as provided in this section, the board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any findings or order made or issued by it.

E. The board may petition any superior court in any county wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order. Upon the filing of such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and may grant such temporary relief or restraining order as it deems just and proper, and may make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. An objection that has not been urged before the board, or a member, agent or agency thereof, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, or a member, agent, or agency thereof, the court may order such additional evidence to be taken before the

board, its member, agent, or agency, and to be made a part of the record. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review as provided by law.

F. Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in any superior court in the county wherein the unfair labor practice in question was alleged to have been engaged in by filing in such court a written petition praying that the order of the board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the board. Upon the filing of such petition the court shall proceed in the same manner as in the case of an application by the board under subsection E of this section, and shall have the same jurisdiction to grant to the board such temporary relief or restraining order as its deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. The

findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

G. When an order of the board made pursuant to this section is based in whole or in part upon facts certified following an investigation pursuant to § 23-1389, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection E or F of this section, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript. The court shall not enforce any order of the board which rests, in whole or in part, upon evidence adduced from witnesses who have not testified under oath and who have not been subject to cross-examination by opposing parties.

H. The commencement of proceedings under subsection E or F of this section shall not, unless specifically ordered by the court, operate as a stay of the board's order.

I. Petitions filed under this article shall be heard expeditiously, and if possible within ten days after they have been docketed.

J. The board may, upon issuance of a complaint as provided in subsection B charging that any person has engaged in or is engaging in an unfair labor practice, petition the superior court in any county wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts

business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper.

K. When it is charged that any person has engaged in an unfair labor practice, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the board, petition the superior court in the county wherein the unfair labor practice in question has occurred, is alleged to have occurred, or wherein the person alleged to have committed the unfair labor practice resides or transacts business, for appropriate injunctive relief pending the final adjudication of the board with respect to such matter. Upon the filing of any such petition the superior court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law, provided that no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon the filing of any such petition the courts shall cause notice thereof to be

served upon any person complained against in the charge and such person, including the charging party, shall be given an opportunity to appear in person or by counsel and present any relevant testimony. For the purposes of this subsection, superior court shall be deemed to have jurisdiction of a labor organization either in the county in which such organization maintains its principal office, or in any county in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit.

§ 23-1391. *Investigatory powers*

A. The board, or its duly authorized agent or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The board, or any member thereof, shall upon application of any party to such proceedings forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the board to revoke, and the board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings,

or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the board, or any agent or agency designated by the board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the state of Arizona, at any designated place of hearing.

B. In case of contumacy or refusal to obey a subpoena issued to any person, the superior court of the county within the jurisdiction of which the person guilty of contumacy or refusal to obey is found or resides or transacts business shall, upon application by the board, have jurisdiction to issue to such person an order requiring such person to appear before the board, or a member, agent or agency thereof, to produce evidence if so ordered, or to give testimony touching the matter under investigation or in question. Failure to obey such order of the court may be punished by the court as contempt.

C. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be

exempt from prosecution and punishment for perjury committed in so testifying.

D. Complaints, orders and other process and papers of the board, or a member, agent, or agency thereof, may be served either personally, by registered or certified mail, by telegraph or by leaving a copy thereof at the principal office, place of business or residence of the person required to be served. The verified return by the individual personally serving or leaving the copy, setting forth the manner of such service, and the return post office receipt or telegraph receipt therefor, when registered or certified, and mailed or telegraphed as provided in this subsection, shall be proof of service. Witnesses summoned before the board, its members, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the superior courts and witnesses whose depositions are taken and the persons taking the depositions shall severally be entitled to the same fees as are paid for like services in the superior courts.

E. The departments and agencies of the state, when directed by the governor, shall furnish the board, upon its request, all unprivileged records, papers and information in their possession relating to any matter before the board.

§ 23-1392. *Penalties*

Any person who wilfully resists, prevents, impedes or interferes with any member of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who violates any provision of this article is guilty of a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than one year, or both.

Provided, however, that none of the provisions of this section shall apply to any activities carried on outside the state of Arizona.

§ 23-1393. *Court jurisdiction*

A. Any person who is aggrieved or is injured in his business or property by reason of any violation of this article, or violation of an injunction issued as provided in this section, may sue in any superior court having jurisdiction of the parties for recovery of any damages resulting from such unlawful action, regardless of where such unlawful action occurred and regardless of where such damage occurred, including costs of the suit and reasonable attorney fees. Upon the filing of such suit the court shall also have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper. Petitions for injunctive relief or temporary restraining orders shall be heard expeditiously. Petitions for temporary restraining orders alleging a violation of § 23-1385 shall be heard forthwith and if the petition alleges that substantial and irreparable injury to the petitioner is unavoidable such temporary restraining orders may be issued pursuant to Rule 65 of the Arizona Rules of Civil Procedure.

B. In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the

unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues. Any agricultural employer shall be entitled to injunctive relief accorded by Rule 65 of the Arizona Rules of Civil Procedure upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities. For the purpose of this subsection, an agricultural commodity or commodities for human consumption with a market value of five thousand dollars or more shall constitute commercial quantities.

C. For the purpose of this article, superior courts shall have jurisdiction of a labor organization in this state if such organization maintains its principal office in this state, or if its duly authorized officers or agents are engaged in promoting or protecting the interests of agricultural employee members or in the solicitation of such prospective members in this state.

D. The service of summons, subpoena, or other legal process of any superior court upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

E. Any labor organization which represents employees as defined in this article, and any agricultural employer, shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of this state.

F. For the purposes of this article, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. Nothing in this section shall be deemed to preclude an agent being sued both in his capacity as an agent and as an individual.

§ 23-1394. *Scope of article*

The provisions of this article shall apply only to such persons, labor organizations or activities as are not within the jurisdiction of the National Labor Relations Act[3] or the jurisdictional guidelines established by the national labor relations board.

§ 23-1395. *Limitations*

A. Nothing in this article, except as otherwise specifically provided, shall be so construed as to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

B. Nothing in this article shall prohibit any individual employed as a supervisor from becoming or

[3] 29 U.S.C.A. § 151 et seq.

remaining a member of a labor organization, but no employer subject to this article shall be compelled to deem such supervisors as agricultural employees for the purpose of any law, either national or local, relating to collective bargaining.

Supreme Court, U. S.
FILED
NOV 24 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATES OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Filed ~~June 18, 1979~~ AUG 8 1978
Jurisdiction Postponed October 10, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Docket Number	Date	Proceedings
1	August 14, 1972	File Complaint and attachments thereto.
4	August 27, 1973	File Plaintiffs' Motion for Preliminary Injunction and Application for a Three-Judge Court. Amended Complaint for Injunctive and Declaratory Relief, and Application for Three-Judge Court, Affidavits and Memorandum.
8	October 1, 1973	File Intervenor-Applicants' Motion and Application to Intervene as Defendants, Memorandum and Notice of Hearing on November 5, 1973, at 10:00 A.M.
-	October 1, 1973	Lodge Answer of Intervenor-Applicants and Response to Application for Three-Judge Court.
-	October 1, 1973	Lodge Intervenor-Applicants' Response for Preliminary Injunction and Application for Three-Judge Court.
9	October 1, 1973	File Defendants' Motion to Dismiss and Response to Plaintiffs' Motion for Preliminary Injunction and Memorandum
10	October 10, 1973	File Defendants' Supplemental Memorandum in support of Motion to Dismiss and Notice of Hearing (9) on November 19, 1973, at 10:00 A.M.
14	October 19, 1973	File Plaintiffs' Memorandum in Opposition to Motion and Application for Intervention.
15	October 23, 1973	File Plaintiffs' Opposition to Defendants' Motion to Dismiss.

Docket Number	Date	Proceedings
16	October 30, 1973	File Intervenor-Applicants' Reply to Plaintiffs' Response to Motion and Application for Intervention.
		Minute Entry: Intervenor-Applicants' Motion and Application to Intervene as Defendants. Bruce Meyerson and James Rutkowski present for Plaintiff. Robert E. Dickelman present for Defendant. Jon Kyl present for Intervenor-Applicants. Order that Intervenor-Applicants' Motion and Application to Intervene as Defendants granted.
18	November 6, 1973	Enter and file Order for Intervention.
19	November 6, 1973	File Answer of Intervenor-Applicants and Response to Application for Three-Judge Court.
20	November 6, 1973	File Intervenor-Applicants' Response to Motion for Preliminary Injunction and Application for Three-Judge Court.
21	November 15, 1973	File Intervenor's Motion to Dismiss, Brief, exhibit and Notice of Hearing on December 10, 1973, at 10:00 A.M.
23	November 28, 1973	File Opposition to Intervenors' Motion to Dismiss and exhibits.
24	December 5, 1973	File Intervenors' Reply to Response to Motion to Dismiss.
26	December 11, 1973	File Affidavit of Charles E. Jones and exhibits thereto.
27	December 11, 1973	File Defendants' Motion to Abstain and Memorandum in Support of Intervenors' Motion to Dismiss.
28	December 14, 1973	File Affidavit of Bruce Meyerson.

Docket Number	Date	Proceedings
	December 14, 1973	Minute Entry: Hearing had on Defendants' Motion to Dismiss and Intervenors' Motion to Dismiss. James Rutkowski and Bruce Meyerson present for Plaintiff, James B. Feeley and Michael Flam present for Attorney General's office, Robert E. Dickelman present for Agriculture Employee's Relation Board and Jon Kyl and Charles E. Jones present for Intervenors. Matter held in abeyance.
29	January 24, 1974	File Defendants' Supplemental Submission to Defendants' Motion to Abstain and Memorandum in Support of Intervenors' Motion to Dismiss and exhibit.
30	February 4, 1974	File Plaintiff's Response to Defendants' Supplemental Submission.
31	February 11, 1974	File letter from James Rutkowski to Judge Muecke and copy of hearing officer's recommendation on Motion to Dismiss.
32	March 1, 1974	File Intervenors' Response to Defendants' Supplemental Submission and Plaintiffs' Response Thereto.
33	March 7, 1974	File Plaintiffs' Motion for Informal Conference and Affidavit.
34	March 11, 1974	File Defendants' Opposition to Plaintiffs' Motion for Informal Conference.
35	March 12, 1974	File Intervenors' Response to Plaintiffs' Motion for Informal Conference.
36	March 20, 1974	File Defendants' Response to Plaintiffs' Motion for Informal Conference.

Docket Number	Date	Proceedings
37	October 2, 1974	Enter and file order that Plaintiffs' Motion for Informal Conference is granted and will be held in chambers on October 7, 1974, at 1:30 p.m.
38	October 7, 1974	File supplemental citation re Motions to Dismiss.
	October 7, 1974	Minute Entry: Informal conference. James Rutkowski and Bruce Meyerson present for Plaintiff, James Feeley present for Defendant State of Arizona, Robert Dickleman present for Defendant. Preliminary Pretrial Conference held.
39	October 24, 1974	Enter and file order that the Defendants' Motions to Dismiss denied and Plaintiffs' Motion for Preliminary Injunction denied; that a three-judge court be impaneled pursuant to Title 28 U.S.C. 2281 and 2284; that the parties shall hereafter file an original and four copies of all their pleadings with the Clerk of the Court; that the parties will be notified when and where the three-judge Court will be convened to conduct further hearings in this matter.
40	October 24, 1974	File Notification and Certificate of Judge Chambers re formation of district court of three judges.
41	October 31, 1974	Enter and file Order of Honorable Richard H. Chambers designating and appointing Honorable Ozell M. Trask, Honorable Walter E. Craig, and Honorable C. A. Muecke to hear and determine this cause, and all motions and proceedings therein.

Docket Number	Date	Proceedings
42	November 4, 1974	File Answer of Gene Blake, William S. Boice, John L. Consaul, Jack Montgomery, Jack McManus, Milton G. Sanders, Jesse A. Udall and Jack D. Williams.
43	November 4, 1974	File Defendants' Notice of Reservation of right to renew Motion to Dismiss.
44	November 4, 1974	File Answer.
45	November 13, 1974	Enter and file order of Honorable Richard H. Chambers (amended) appointing and designating Honorable John F. Kilkenny, Honorable Walter E. Craig, and Honorable C. A. Muecke to hear and determine this case, and all motions and proceedings therein.
47	November 27, 1974	Intervenors' Motion to Dismiss, or in the Alternative to Abstain.
48	November 27, 1974	Intervenors' Memorandum in Support of Motion to Dismiss or Abstain and attachment.
49	November 27, 1974	Intervenors' Motion for Preliminary Hearing of Motion to Dismiss or Abstain.
51	December 13, 1974	Memorandum Joining in Support of Motion to Dismiss or Abstain.
52	December 13, 1974	Defendants' Submission in Support of Intervenors' Motion to Dismiss or Abstain.
53	January 2, 1975	Plaintiffs' Opposition to Intervenors-Defendants Motion to Dismiss.
56	January 7, 1975	Response to Plaintiffs' Opposition to Intervenors'-Defendants' Motion to Dismiss.

Docket Number	Date	Proceedings
57	January 8, 1975	Intervenors' Reply to Opposition to Dismiss.
	January 13, 1975	Minute Entry: Hearing on Intervenors' Motion to Dismiss or, in the Alternative, to Abstain and oral argument on merits. J. Rutkowski present for Plaintiff; J. B. Feeley and M. S. Flam present for Defendants, Jon Kyl, C. E. Jones and J. Weldon present for Intervenors, R. E. Dickelman present for Agricultural Employee's Relations Board. By Stipulation Order named Defendants may be changed from Jack Williams to Raul Castro, Governor, Gary Nelson to Bruce Babbitt, Attorney General, Ernest Garfield to Bart Fleming, Treasurer of the State of Arizona and Jesse A. Udall to Ernest N. Holgate. Order all further pleadings be filed with last supplemental brief; that matter taken under advisement.
58	January 13, 1975	Plaintiffs' Supplemental Memorandum in Opposition to Motion to Dismiss.

Docket Number	Date	Proceedings
59	January 16, 1975	Order ruling on Defendants' Motion to Dismiss is reserved; final hearing to dispose of the case will be set following additional preparation by parties for such hearing; that pretrial conference being held on January 15, 1975, with following counsel present: James Rutkowski for Plaintiffs, Michael Flam for Defendant Office of the Attorney General, Robert Dickelman for Defendant Agricultural Employment Relations Board, and Jon Kyl and Charles Jones for Intervenors Arizona Farm Bureau Federation; that the parties agreed at that pretrial conference that a final hearing with the three-judge panel presiding could dispose of this case by way of ruling on Defendants' Motion to Dismiss or Cross-Motions for Summary Judgment, or a trial to the three-judge panel; that on March 17, 1975, at 2:00 P.M. the parties will hold pretrial conference with Judge Muecke.
60	February 3, 1975	Plaintiffs' Formulation of Factual Issues.
61	February 27, 1975	Defendants' and Intervenors' written Interrogatories to Plaintiffs.
62	March 7, 1975	Notice, Stipulation and Order Michael W. L. McCrory is associated as counsel for Plaintiffs.
63	March 10, 1975	Stipulation re harvest seasons, etc.
64	March 14, 1975	Answers to Defendants' and Intervenors' written Interrogatories.
	March 17, 1975	Minute Entry: Pretrial conference held.

Docket Number	Date	Proceedings
65	March 17, 1975	Defendants' and Intervenors' Formulation of Factual Issues, filed March 14, 1975.
66	March 18, 1975	Order that this case having come on for Preliminary Pretrial Conference on March 17, 1975, with following attorneys present: James Rutkowski and Michael McCrory for Plaintiffs; Robert Dickelman and William Gibney for Defendant; and Jon Kyl and Charles Jones for the Intervenors; that both sides are to file with the Court a schedule of discovery they will take including witnesses not later than April 21, 1975; that said schedule shall also include a date by which parties will submit a proposed pretrial order all in full compliance with Local Rule 42; that the Plaintiffs shall file any motions to certify this matter as a class action not later than April 21, 1975.
68	April 18, 1975	Plaintiffs' Request for Preliminary Pretrial Conference.
69	April 18, 1975	Plaintiffs' Proposed Discovery and Pretrial Schedule.
	April 18, 1975	Lodge Plaintiffs' Proposed Pretrial Order.
70	April 18, 1975	Intervenors' and Defendants' Schedule of Discovery.
71	April 21, 1975	Plaintiffs' Ruben Alaniz and Matilda Varela Motion to Designate and Maintain Class Action and Memorandum.
	May 1, 1975	Minute Entry: Pretrial Conference held this date.

Docket Number	Date	Proceedings
73	May 1, 1975	Motion of William Gibney for Substitution of Counsel for the Agricultural Employment Relations Board.
76	May 5, 1975	Order that William Gibney, General Counsel to the Agricultural Employment Relations Board be substituted as the attorney of record on behalf of Agricultural Employment Relations Board and on behalf of its members, individually, filed May 1, 1975.
77	May 9, 1975	Response of Defendants and Intervenors to Plaintiffs' Motion for Class Action Designation and exhibits.
78	May 14, 1975	Plaintiffs' Request for Admissions.
79	May 14, 1975	Plaintiffs' Written Interrogatories to Defendants and Intervenors.
80	May 19, 1975	Plaintiffs' Reply in Support of Motion for Class Action Designation.
81	May 27, 1975	Notice of Oral Deposition of Fidelis Kuban.
82	May 27, 1975	Notice of Oral Deposition of Guadalupe Sanchez.
83	May 27, 1975	Defendants'-Intervenors' Supplemental Response and Affidavits.
84	June 2, 1975	Notice of Oral Deposition to Marshall Berry.
85	June 5, 1975	Letter from James Rutkowski, Esquire, to counsel.
86	June 5, 1975	Plaintiffs' Supplemental Answers to Interrogatories.
87	June 9, 1975	Plaintiffs' Request to Produce.
88	June 12, 1975	Notice of Oral Deposition of Gustavo Gutierrez.
89	June 12, 1975	Notice of Oral Deposition to Cesar Chavez.

Docket Number	Date	Proceedings
91	June 19, 1975	Plaintiffs' Motion for Protective Order and to Quash or Modify Subpoena Duces Tecum, Memo and Attachment.
93	June 20, 1975	Defendants' and Intervenors' Answers to Plaintiffs' Written Interrogatories.
94	June 20, 1975	Defendants' and Intervenors' Answers to Plaintiffs' Revised Requests for Admission.
95	June 30, 1975	Plaintiffs' Second Set of Supplemental Answers to Interrogatories.
96	June 30, 1975	Intervenors' Supplemental Answers to Interrogatories.
97	July 1, 1975	Intervenors' Response to Motion for Protective Order and to Quash or Modify Subpoena Duces Tecum.
98	July 3, 1975	Order that plaintiffs' motion for protective order and to quash or modify subpoena duces tecum scheduled for July 7, 1975, is continued for hearing on July 14, 1975 at 10:00 A.M.
98	July 8, 1975	Deposition of Lupe Sanchez.
99	July 9, 1975	Statement of Counsel in Support of Motion for Protective Order & Affidavit.
	July 14, 1975	Minute Entry: Plaintiffs' motion for protective order and to quash or modify subpoena duces tecum on for hearing. Michael W.L. McCrory and James Rutkowski present for Plaintiffs; Charles E. Jones, Harold Merkow and Wm. Gibney present for Defendants. Order that motion Granted.

Docket Number	Date	Proceedings
100	July 15, 1975	Deposition of Father Fidelis Kuban.
101	July 16, 1975	Plaintiffs' Notice of Oral Deposition of James W. Cherry, et al.
102	July 22, 1975	Deposition of D. Marshall Barry, Ph.D.
103	July 29, 1975	Deposition of James W. Cherry.
104	August 19, 1975	Deposition of Paul Hunter.
105	August 19, 1975	Deposition of Rose Lopez.
	August 27, 1975	Lodge Preliminary Pretrial Order.
106	September 2, 1975	Deposition of H.S. Raymond.
107	September 2, 1975	Deposition of LeRoy Bridges.
108	September 3, 1975	Notice of Oral Deposition of John Foley and William Foster.
109	September 8, 1975	Deposition of Ralph Bodine.
110	September 9, 1975	Intervenors' Notice of Oral Deposition of Cesar Chavez.
113	October 29, 1975	Deposition of George W. Campbell, Jr. and Plaintiff's Exhibits 1, 2, 3, 4A, 4B, 5, 6, 4C, 10 and Defendant's 1.
115	November 12, 1975	Deposition of Stanley Lubin (Vol. 1).
115a	November 12, 1975	Deposition of Stanley Lubin (Vol. 11).
120	November 28, 1975	Defendants' and Intervenors' Motion to Renew Motion to Dismiss or for Summary Judgment.
121	November 28, 1975	Defendants' and Intervenors' Brief.
122	December 1, 1975	Plaintiffs' Trial Memorandum in Support of Request for Declaratory and Injunctive Relief.
123	December 1, 1975	Defendants' and Intervenors' Request for Hearing on their Motion to Renew Motion to Dismiss or For Summary Judgment before a Three-Judge Panel to be set by the Court.

Docket Number	Date	Proceedings
124	December 1, 1975	Notice of Hearing on Defendants' and Intervenors' Motion to Dismiss or For Sanctions on December 22, 1975, at 10:00 A.M. before the Honorable C.A. Muecke.
125	December 1, 1975	Defendants' and Intervenors' Motion to Dismiss or for Sanctions.
126	December 3, 1975	Opposition to Defendants' and Intervenors' Motion to Dismiss or for Sanctions and Plaintiffs' Cross-Motion to Strike Pleading and for Sanctions & Request for a Conference.
127	December 8, 1975	Defendants' and Intervenors' Reply to Opposition to Motion to Dismiss or for Sanctions.
128	December 8, 1975	Notice of Hearing of Plaintiffs' Cross-Motion to Strike Pleadings and for Sanctions on December 22, 1975, at 10:00 A.M.
129	December 23, 1975	Plaintiffs' Response to Defendants' and Intervenors' Trial Memo and Opposition to Defendants' and Intervenors' Motion to Dismiss.
130	December 24, 1975	Intervenors' Response to Plaintiffs' Trial Memo in Support of Request for Declaratory and Injunctive Relief.
131	January 7, 1976	Plaintiffs' Request to File Reply Memo.
132	January 16, 1976	Stipulation and Order that parties have to January 23, 1976, to submit the pretrial order and their respective reply briefs.

Docket Number	Date	Proceedings
	January 20, 1976	Minute Entry: PRETRIAL CONFERENCE held. Attorneys present: Michael McCrory, James Rutkowski, Jon Kyl, Wm. Gibney, and Charles E. Jones and Larry F. Smith.
133	January 26, 1976	Defendants'-Intervenors' Reply to Plaintiffs' Opposition to Defendants'-Intervenors' Motion to Renew Motion to Dismiss.
	January 26, 1976	Lodge Pretrial Order.
134	January 26, 1976	Intervenors' Reply to Plaintiffs' Response to Defendants'-Intervenors' Pretrial Memo.
135	January 26, 1976	Plaintiffs' Reply to Defendants'-Intervenors' Response to Plaintiffs' Trial Memo in Support of Request for Declaratory and Injunctive Relief and exhibit.
136	January 28, 1976	Deposition of Cesar Chavez.
137	February 20, 1976	Plaintiffs' Request for Informal Conference.
138	February 27, 1976	Defendants' and Intervenors' Motion in Limine and Appendix.
139	March 15, 1976	Plaintiffs' Opposition to Defendants' and Intervenors' Motion in Limine.
140	April 8, 1976	Intervenors' Reply to Plaintiffs' Opposition to Defendants' and Intervenors' Motion in Limine.
141	May 11, 1976	Letter from Jennings, Strouss & Salmon to Judge Muecke re Trial time.

Docket Number	Date	Proceedings
142	May 24, 1976	Order that this Court having received and considered the letters from plaintiffs and defendants both dated May 10, 1976, finds that the June 22, 1976, thru June 25, 1976 date previously set for the hearing of motions and for the trial of this case is hereby vacated and is rescheduled for January 18, 1977; that the parties shall contact this Court for a date mutually convenient to the parties and the Court for a pretrial conference so that an attempt can be made to simplify the issues and otherwise facilitate the disposition of this case as provided by Rule 16 of the Federal Rules of Civil Procedure.
143	August 23, 1976	Intervenors' Request for Oral Argument and Memo.
144	September 9, 1976	Plaintiffs' Opposition to Request for Oral Argument.
145	September 10, 1976	Defendants' Response to Intervenors' Motion for Oral Argument.
146	September 10, 1976	Intervenors' Reply to Opposition to Request for Oral Argument.
-	November 8, 1976	Minute Entry: Order that this cause is set for Preliminary Pretrial Conference on November 29, 1976, at 3:30 P.M.
-	November 29, 1976	Minute Entry: PRETRIAL CONFERENCE held.
147	December 1, 1976	Order that the Motion in Limine is Granted; that the parties shall meet and have a Pretrial Conference on December 28, 1976, at 9:00 A.M.

Docket Number	Date	Proceedings
148	December 3, 1976	Intervenors' Memorandum as to Alternative Recognition Procedures under the Act.
149	December 9, 1976	Plaintiffs' Motion to Reconsider and Memorandum.
150	December 9, 1976	Plaintiffs' Memorandum on the Absence of Alternative Recognition Procedures under the Arizona Agricultural Employment Relations Act.
151	December 27, 1976	Intervenors' Response to Plaintiffs' Motion to Reconsider
152	December 27, 1976	Intervenors' Written Interrogatories to Plaintiffs.
153	January 12, 1977	Plaintiffs' Offer of Proof and attachments.
154	January 12, 1977	Plaintiffs' Cases Excluding packing Shed Employees, Stitchers and Haulers from NLRA Coverage.
155	January 13, 1977	Defendants' and Intervenors' Motion in Limine.
-	January 13, 1977	Lodge Pretrial Order.
156	January 14, 1977	Answers to Intervenors' Written Interrogatories to Plaintiffs.
157	January 14, 1977	Intervenors' Memorandum setting forth cases indicating NLRA coverage of packing shed employees, stitchers and haulers.
158	January 18, 1977	Stipulation Re. Harvest and Pre-Harvest Seasons and Attachments.
159	January 18, 1977	Plaintiffs' Opposition to Defendants' and Intervenors' Motion in Limine, Filed January 17, 1977.

Docket Number	Date	Proceedings
-	January 18, 1977	Minute Entry: NON-JURY TRIAL and Hearing on all pending motions. Michael W.L. McCrory and James Rutkowski, present for plaintiff; Charles E. Jones, Jon Kyle, present for Intervenors; Alan S. Kainan, present for State of Arizona; Steve Shadle, present for Yuma Citrus Shippers Association; William Gibney, present for Agricultural Employment Relations Board, Terry Bond, Director of Agricultural Employment Relations Board, Cesar Estrada Chaves sworn and examined. Plaintiffs' Exhibits 1 and 2 admitted. At 4:30 P.M. order Court recessed until January 19, 1977, at 9:00 A.M.
-	January 19, 1977	Minute Entry: Enter further proceedings of Non-Jury Trial. All parties and counsel present. Cesar Estrada Chavez further examined. Defendants' Exhibit A admitted. At 4:30 P.M. order Court recessed until January 20, 1977, at 9:00 A.M.
-	January 20, 1977	Minute Entry: Enter further proceedings of Non-Jury Trial. All parties present and counsel present. Defendants' Exhibits B admitted. At 4:30 P.M order Court recessed until January 21, 1977, at 9:30 A.M.

Docket Number	Date	Proceedings
-	January 21, 1977	Minute Entry: Enter further proceedings of Non-Jury Trial. All Counsel present. Plaintiffs' Exhibit No. 3 admitted. Both sides rest. The Court will hear no closing oral argument. Parties to file simultaneous briefs within 30 days after the receipt of the reporter's transcript (6 to 8 weeks from now reporter states) with replies to each of the briefs and other papers to be filed simultaneously within 15 days thereafter. At 2:30 P.M. order Court recessed.
160	January 21, 1977	Pretrial Order.
161	March 3, 1977	Transcript of Non-Jury Trial and Hearing on all Pending Motions, Volume I.
162	March 3, 1977	Transcript of Non-Jury Trial and Hearing on all Pending Motions, Vol. II
-	May 2, 1977	Lodge Plaintiffs' Proposed Findings of Fact, Conclusions of Law and Memorandum.
-	May 2, 1977	Lodge Intervenors' Proposed Findings of Fact and Conclusions of Law.
163	May 2, 1977	Defendants-Intervenors' Memorandum on the Existence of a Substantial Constitutional Question.
164	May 23, 1977	Defendants' and Intervenors' Response to Plaintiffs' Memorandum of the Existence of a Substantial Constitutional Question.
165	May 23, 1977	Defendants' and Intervenors' Response to Plaintiffs' Proposed Findings of Fact and Conclusions of Law.

Docket Number	Date	Proceedings
166	May 24, 1977	Plaintiffs' Response to Defendants' and Intervenors' Memorandum on the Existence of a Substantial Federal Question and Proposed Findings of Fact and Conclusions of Law.
167	November 11, 1977	Order that the parties submit proposed Findings of Fact and Conclusions of Law to the Court and to each other not later than December 15, 1977; that the Court takes official judicial notice pursuant to Rule 25, FRCP, that Defendant Raul Castro has been supplanted as Governor of the State of Arizona by the Hon. Wesley Bolin who is therefore substituted as the Defendant in stead and place of Defendant Castro.
168	April 20, 1978	Opinion and Order that a permanent injunction shall issue enjoining Defendants from applying or enforcing any of the provisions of ARS 23-1381, et seq.
169	April 20, 1978	JUDGMENT in favor of Plaintiffs herein in accordance with the opinion of the Court and a permanent injunction is hereby entered preventing enforcement by Defendants herein of A.R.S. 23-1381, et seq.
-	April 20, 1978	Copy of Opinion and Order and Judgment to Judge Kilkenny, Judge Craig, Michael W.L. McCrory, James Rutkowski, The Attorney General, Jennings, et al. and William A. Gibney.
170	May 1, 1978	Plaintiffs' Motion for Attorney's Fees and Memorandum; Notice of Hearing on May 22, 1978 at 10:00 AM.

Docket Number	Date	Proceedings
171	May 1, 1978	Plaintiffs' Bill of Costs in sum of $8,853.10.
172	May 12, 1978	Plaintiffs' Errata - re. omission of pages 7 and 8 to Plaintiffs' Motion for Attorney's Fees and Memorandum filed May 1, 1978.
173	May 16, 1978	Affidavit of Michael W.L. McCrory for Motion for Attorney's Fees.
176	May 26, 1978	Defendants' and Intervenors' Objections to Plaintiffs' Bill of Costs.
177	May 26, 1978	Intervenors' Response to Plaintiffs' Motion for Attorneys' Fees.
178	May 27, 1978	Defendants' and Intervenors' Reply to Plaintiffs' Motion for Attorneys' Fees.
180	June 5, 1978	Notice of Association of Counsel (Ely & Bettini) for Plaintiffs for purpose of arguing matter of attorneys' fees.
182	June 13, 1978	Defendants' Motion for Stay of Judgment Granting Injunction and Memorandum and Notice of Hearing on June 26, 1978, at 10:00 A.M.
183	June 13, 1978	Notice of Appeal to the Supreme Court Clerk and Court Reporter.
184	June 14, 1978	Plaintiffs' Response to Defendants' and Intervenors' Objection to Plaintiffs' Bill of Costs.
185	June 14, 1978	Plaintiffs' Reply to Defendants' and Intervenors' Response to Plaintiffs' Motion for Attorneys' Fees.
187	June 21, 1978	Intervenors' Supplemental Response to Plaintiffs' Reply Memorandum.

Docket Number	Date	Proceedings
-	June 27, 1978	Minute Entry: Plaintiffs' Motion for Attorneys' Fees on for hearing. (List of Counsel present attached to Minutes.) Motion argued by Herb Ely for Plaintiffs, Richard Turner for State of Arizona; and C.E. Jones for Intervenors. James Rutkowski sworn and examined. Plaintiffs' Exhibit 1 marked and admitted in evidence. The Court directs counsel for Intervenors-Defendants to submit additional briefs within 5 days, plaintiffs to respond within five days and Intervenors-Defendants to reply within 5 days. The Court requests that Mr. Ely set a time and date for additional testimony of Michael McCrory on attorneys' fees. The Motion is taken under advisement.
189	June 27, 1978	Clerk's Taxation of Costs for Plaintiffs in amount of $3,207.10.
-	June 27, 1978	Enter costs in J.D.
190	July 3, 1978	Intervenors' Supplemental Memorandum of Law Relative to Attorneys' Fees.
191	July 3, 1978	Plaintiffs' Opposition to Motion for Stay of Judgment.
192	July 5, 1978	Plaintiffs' Motion to Review Taxation of Costs, Memorandum and Notice of Hearing on July 7, 1978, at 1:30 P.M.
195	July 6, 1978	Defendants' and Intervenors' Reply to Response to Motion for Stay of Judgment.

Docket Number	Date	Proceedings
-	July 7, 1978	Plaintiffs' Motion for Attorneys' Fees (170); and Plaintiffs' Motion to review taxation (Minute Entry) of costs (192) on for hearing. James Rutkowski sworn and examined; Michael McCrory sworn and examined. Plaintiffs' Exhibits 2, 3, 9, 10, 11, 12 and 13 admitted. Defendant and Intervenor's motion for stay also heard. All motions are taken under advisement. Attorneys present were: Michael McCrory, Herbert Ely and James Rutkowski present for Plaintiffs, Jon Kyl and William A. Gibney, present for Intervenors and Richard K. Turneck present for State Defendants.
196	July 13, 1978	Plaintiffs' Reply to Intervenors' Supplemental Memorandum re. Attorneys' Fees.
-	July 17, 1978	Intervenors' Reply Relative to Attorneys' Fees.
198	August 2, 1978	Order Defendants' and Intervenors' Motion for Stay of Judgment is Denied.
199	August 18, 1978	Plaintiffs' Exhibits 4, 5, 6, 7 and 8.
200	September 12, 1978	Opinion and Order that Plaintiffs' motion for attorneys' fees is granted and the amount of $44,970 is assessed against the Defendants and Intervenors for payment of said fees.
201	September 12, 1978	JUDGMENT Granting Plaintiffs' Motion for Attorneys' Fees against Defendants and Intervenors in amount of $44,970. with interest thereon until paid.
202	September 20, 1978	Defendants' Designation of Record.

Docket Number	Date	Proceedings
-	September 22, 1978	Record on appeal transmitted to Supreme Court.
203	October 11, 1978	Defendants' Notice of Appeal to the 9th Circuit Court of Appeals from Judgment entered September 12, 1978. Copy to Court Reporter and 9th Circuit Court of Appeals.
204	October 11, 1978	Defendants' Notice of Appeal to the Supreme Court of the United States ($5 fee paid).
-	October 12, 1978	Copy to Court Reporter and U.S. Supreme Court
-	October 12, 1978	$250 deposited in Registry Fund and $5 fee paid on appeal to 9th Circuit Court of Appeals.
205	October 18, 1978	Certified copy of Order from the Supreme Court of the United States that further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.
206	October 20, 1978	Appellants' Designation of Contents of Appendix.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

UNITED FARM WORKERS NATIONAL UNION, on behalf of itself and its members, GUSTAVO GUTIERREZ, an agent of the UNITED FARM WORKERS NATIONAL UNION in the State of Arizona, RUBEN ALANIZ and MATILDA VARELA on behalf of themselves and all others similarly situated, and WENDY ROSE, an individual,

Plaintiffs,

VS.

JACK WILLIAMS, Governor of the State of Arizona, GARY NELSON, Attorney General of the State of Arizona, ERNEST GARFIELD, Treasurer of the State of Arizona, TED G. HAWKINS, Finance Commissioner of the State of Arizona, GENE BLAKE, WILLIAM S. BOICE, JOHN L. CONSAUL, JACK MONTGOMERY, JACK MCMANUS, MILTON G. SANDERS, JESSIE A. UDALL, and JACK D. WILLIAMS, Individually and as members of the Arizona Agricultural Labor Relations Board,

Defendants.

NO. CIV 72-445 PHX CAM

AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND APPLICATION FOR A THREE JUDGE COURT

Filed August 27, 1973

Plaintiffs, for their cause of action, allege as follows:

JURISDICTION

1.

This is a civil action for injunctive and declaratory relief against certain officials of the State of Arizona who are charged with enforcement of the Arizona Agricultural Employment Relations Act, Arizona Revised Statutes, Title 23, Ch. 8, Art. 5, Sections 23-1381 to 23-1395 (a copy of this statute was attached to the original complaint and is incorporated by reference.) This Court has jurisdiction under 28 U.S.C. 1343 and 42 U.S.C. 1983, this being an action to redress the deprivation by the defendants, acting under color of state law, of plaintiffs' civil rights privileges and immunities secured by the Constitution and laws of the United States. Jurisdiction is also founded upon 28 U.S.C. 2201, as plaintiffs seek a declaratory judgment as to the constitutionality of the aforesaid Arizona Agricultural Employment Relations Act, (hereinafter referred to as the "Act").

2.

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. 2281 and 2284 because plaintiffs seek, *inter alia,* injunctive relief against the enforcement of the aforesaid Arizona Agricultural Employment Relations Act on the ground that it is unconstitutional, on its face, under the free speech and assembly provisions of the First Amendment to the United States Constitution, the due process and

equal protection clauses of the Fourteenth Amendment to the United States Constitution, the "supremacy" provisions of Article VI, Cl. 2 of the United States Constitution, the "commerce" provisions of Article I, Sec. 8, Cl. 3 of the United States Constitution, and Articles I, Section 10 of the United States Constitution.

3.

Plaintiff UNITED FARM WORKERS NATIONAL UNION (hereinafter referred to as plaintiff "Union") is an unincorporated association which represents farm workers in Arizona and elsewhere in collective bargaining and other related matters. These farm workers are actively engaged within Arizona in efforts to secure collective bargaining rights for their union and collective bargaining agreements with their employers. Pursuant to such efforts the plaintiff Union and its members have organized and participated in, and desire to continue to organize and participate in, strikes, boycotts, peaceful picketing, collective bargaining and other concerted activities in support of plaintiff Union and its efforts to negotiate collective bargaining agreements with agricultural employers in Arizona and elsewhere.

4.

Plaintiff GUSTAVO GUTIERREZ is a resident of the state of Arizona and an agent of plaintiff Union, who for several years has actively organized and participated in and desires to continue to organize and participate in strikes, boycotts, peaceful picketing, collective bargaining and other concerted activities in

support of plaintiff Union in its efforts to negotiate collective bargaining agreements on behalf of its members.

5.

Plaintiffs RUBEN ALANIZ and MATILDA VARELA are representatives of the class of plaintiff farm workers who are regularly engaged in the growing and harvesting of crops and the packing of agricultural crops where packing is accomplished in the fields. The members of this class of plaintiffs are regularly employed in agricultural operations located within the state of Arizona.

6.

Plaintiffs RUBEN ALANIZ and MATILDA VARELA bring this action individually and on behalf of all others similarly situated pursuant to the provisions of Rules 23 (a) and (b) (2) of the Federal Rules of Civil Procedure. The members of this class described in Paragraph 5 are so numerous as to make their joinder impracticable. There are substantial questions of law and fact common to the class, and plaintiffs will fairly and adequately represent and protect the interest of the class.

7.

Plaintiff WENDY ROSE is a resident of the state of Arizona, a consumer of Arizona agricultural products concerned with the quality and condition of such products and a supporter of the plaintiff Union and plaintiff farm workers in their efforts to negotiate and enter into collective bargaining agreements. In furtherance of her concern as a consumer and her efforts to demonstrate support for and to assist the aforesaid

plaintiffs, plaintiff WENDY ROSE has participated in and desires to continue to participate on boycott activities directed against the products of agricultural employers who refuse to bargain collectively with the plaintiff Union and workers.

8.

Defendant JACK WILLIAMS is the Governor of the State of Arizona and is responsible under Section 23-1386 of the Act, for the appointment of the Chairman, Members and General Counsel of the Agricultural Employment Relations Board (hereinafter referred to as the "Board"). Defendant GARY NELSON is the Attorney General of the State of Arizona, and is responsible under Arizona Revised Statutes Section 23-1392 for the prosecution of persons charged with the commission of acts defined as criminal misdemeanors by the Section. Defendants GENE BLAKE, WILLIAM BOICE, JOHN CONSAUL, JACK MONTGOMERY, JACK McMANUS, MILTON SANDERS, JESSE A. UDALL are the members of the Agricultural Employment Relations Board (Board) established by the Act and JACK DOE WILLIAMS is the executive secretary of that board, all of whom were appointed by defendant GOVERNOR JACK WILLIAMS. In this capacity they are empowered by the Act, *inter alia* to receive and investigate complaints of unfair labor practices, conduct hearings on the same and hold representation elections. Defendant ERNEST GARFIELD is the Treasurer of the State of Arizona who is ultimately responsible for the state funds appropriated under Section 23-1395 of the Act.

T. G. HAWKINS is the Assistant Director of Finance of the State of Arizona who is empowered to effect the immediate dispersal of those funds to the Board.

CAUSE OF ACTION

9.

On or about May 11, 1972, the aforesaid Arizona Employment Relations Act was passed and enacted by the legislature of the state of Arizona. On or about May 11, 1972, said statute was signed into law by defendant Jack Williams, Governor of the State of Arizona, and on August 13, 1972, said statute went into full force and effect.

10.

The Act as a whole, insofar as it attempts to regulate agricultural labor relations, is inconsistent with the expressed intent of Congress to assert exclusive jurisdiction over such subject matter by enactment of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*), and thus in violation of the "supremacy" provisions of Article VI, Cl. 2 of the United States Constitution.

11.

The Act as a whole imposes unreasonable burdens upon and discriminates against interstate commerce, and is thus in violation of the "commerce" provisions of Article I, Sec. 8, Cl. 3 of the United States Constitution.

12.

The Act as a whole violates the Equal Protection clause of the Fourteenth Amendment in that:

A. The classification established by the Act, both in its intent and effect, operates to single out the class of

plaintiff farm workers as the only group subject to the restrictive and burdensome provisions of the law and invidiously discriminates against this class which is overwhelmingly made up of persons who are of an extremely low income group.

B. The classification between the plaintiff agricultural employees who are covered by the Act and other employees whom the law does not cover is arbitrary and unreasonable. There exists no legitimate state interest and no compelling interest for including the plaintiffs within the coverage of this law while excluding other employees, many of whom are also employed in the agricultural industry, from coverage under the Act.

C. The provisions of this law unduly restrict the plaintiffs' rights to picket, strike, boycott and gain recognition as the lawful bargaining agent, thereby infringing on the plaintiffs' fundamental rights of association and communication guaranteed by the First and Fourteenth Amendments. The application of these restrictive provisions and regulations upon the First Amendment activities of the plaintiffs without also applying them to other employees similarly situated denies to members of the plaintiff class, a particular and limited group of field workers, the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United State.

13.

The Act as a whole constitutes a Bill of Attainder and is thus a violation of Article I, Section 10 of the United States Constitution in that it: a) singles out the United Farm Workers National Union, its members,

agents and employees: b) burdens that organization, its associates and supporters by imposing erroneous and discriminatory legislative judgment and verdict; c) prescribes in specific terms the penalties to be inflicted upon that organization and its agents.

14.

Each and every of the following provisions of the Arizona Agricultural Employment Relations Act, *inter alia*, are unconstitutional on its face in the following respects:

A. Section 23-1385B(7) which provides that it shall be an unfair labor practice for a labor organization or its agents to "induce or encourage . . . any secondary employer or any executive or management employee of any secondary employer to make a management decision not to handle, transport, process, pack, sell or distribute any agricultural commodity of an agricultural employer with whom a labor dispute exists" is unconstitutional under the First and Fourteenth Amendments of the United States Constitution;

B. Section 23-1385B(8) of the Act, which provides that it shall be an unfair labor practice for a labor organization or its agents to "induce or encourage . . . the ultimate consumer of any agricultural product . . . by the use of dishonest, untruthful and deceptive publicity . . ." is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

C. Section 23-1385B(11) which provides that it shall be an unfair labor practice for a labor organization or its agents to "intimidate, restrain or coerce agricultural employers in the exercise of the rights guaranteed by Section 23-1384 (management rights)" is unconstitutional under the First and Fourteenth Amendments;

D. Section 23-1385B(12) which makes it an unfair labor practice for a labor organization or its agents to picket, boycott or threaten to picket or boycott in a variety of situations is an unconstitutional prior restraint and infringement of free speech activities guaranteed by the First and Fourteenth Amendments.

Each of the foregoing provisions in Paragraph 14 constitutes a denial of due process and infringes upon the freedoms of speech, association and assembly because:

1. it is overbroad in that it encompasses within the scope of its prohibitions conduct which is protected free speech;

2. it is vague in that it fails to establish any ascertainable standards of guilt;

3. it is susceptible of arbitrary sweeping and improper application; and

4. it provides for an unconstitutional prior restraint on the plaintiffs' speech and their communications with the consuming public.

E. Section 23-1393 (B) providing that "in the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott" violates the First and Fourteenth Amendment rights of free speech and due process in that it permits the blanket enjoining of plaintiffs' First Amendment free speech activities without providing the plaintiffs with notice and an opportunity for a hearing to determine if the agricultural employer is in fact suffering irreparable harm and if the employees' strike or boycott activities are in any way unlawful.

F. Section 23-1385 (B) (13), which provides that it shall be an unfair labor practice for a labor organization or its agents "to call a strike unless a majority of the employees within the bargaining unit has first approved the calling of such a strike by secret ballot," denies the minority of employees in the bargaining unit those same fundamental rights in violation of the Equal Protection Clause of the Fourteenth Amendment.

G. The extensive provisions of the Act dealing with "Representatives and Elections" (23-1389) are tragically ill-suited for the agricultural industry and indicate a total disregard for the circumstances under which the plaintiffs live and work, including the largely seasonal nature of their work and their indigent state, and are, unconstitutional in that; *inter alia:*

1. the provisions disenfranchise many agricultural workers and will prevent them from organizing and gaining recognition of a union for the protection of their economic interests thereby violating the First and Fourteenth Amendments to the Constitution;

2. the provisions deny the plaintiff farm workers the use of all informal procedures designed to permit a union to demonstrate representation.

3. they deny the class of plaintiff equal protection of the laws in that they are singled out as the only class of workers limited to such restrictive voting recognition procedures.

H. The section "Prevention of Unfair Labor Practices" (23-1390) is also entirely ill-suited for agricultural employees. It ignores the seasonal and migrant nature of their work and their indigent state, thereby denying them an opportunity for meaningful hearings and are unconstitutional in that:

1. the provisions deny a process for unfair labor practice hearings to those agricultural employees who must move from ranch to ranch and frequently to another county or state to work.

2. the provisions restrict the processes for unfair labor practice proceedings to those who can afford the time and high costs of such proceedings thereby denying equal protection and due process of law to the members of the class of plaintiffs;

3. the application of the provisions would necessarily affect very personal and fundamental rights and interests and thereby constitute a denial of due process of law guaranteed by the Fourteenth Amendment.

I. Section 23-1392 establishing criminal penalties for violating any provision of the Act is unconstitutional in that:

1. it subjects only the plaintiff agricultural employees to criminal penalties for activities and conduct which when conducted by similarly situated employees of any other industry or occupation is not subject to criminal penalties, thereby denying the plaintiffs equal protection of the laws as guaranteed by the Fourteenth Amendment;

2. it fails to adequately and clearly define persons or activities which are subject to criminal prosecution and includes conduct which is protected under the First Amendment of the United States Constitution, and is therefore void for vagueness and overbreadth.

J. Section 23-1385 (C) unduly limits the contact and restricts the communication between the plaintiff Union and the plaintiff class of workers thereby infringing upon the plaintiffs' freedom of speech guaranteed by the First Amentment. Said Section's description of permissible form and content of speech is vague and overbroad, and, in conjunction with Section 23-1392, criminal penalties, will necessarily exert a chilling effect and prior restraint on the freedom of speech of the plaintiffs in violation of

the First Amendment to the United States Constitution.

K. Sections 1384 and 1385 (D) establish non-negotiable management rights and arbitrarily exclude from the topics subject to collective bargaining between employers and employees topics which are negotiable for employees and labor organizations not covered by the Act and which are are of utmost concern to agricultural employees. These sections in conjunction with the criminal penalties section 23-1392, are vague and overbroad, will necessarily exert a chilling effect on the plaintiffs during the negotiating process and prevent plaintiffs from engaging in effective collective bargaining, thereby constituting an unconstitutional infringement of plaintiffs' First Amendment rights.

L. Section 23-1382 (2) of the Act defines "agricultural employer" for purposes of coverage under the Act in such a way as to give some agricultural employers either the option or opportunity to decide whether or not they wish to be covered under the Act while making no provision to give similar option to the employees of these same employers. Such discrimination in terms of coverage under the Act constitutes a denial of due process and equal protection of the law prohibited by the Fourteenth Amendment.

M. The provisions of Section 23-1393(F) subjects the plaintiff Union to unfair labor practice proceedings and criminal penalties for the unauthorized and unratified acts of union members and unassociated

individuals and is therefore a denial of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

N. The act, by narrowly defining "labor dispute" in Section 23-1382(6), unduly restricts the circle of economic competition to those workers immediately involved thereby excluding other farm workers and union members who have vital economic interests in the dispute, thereby infringing upon fundamental rights guaranteed by the First Amendment.

15.

As shown more fully hereinabove, the plaintiffs RUBEN ALANIZ and MATILDA VARELA are agricultural employees who are entitled to due process, equal protection of the laws and protection of their freedoms of speech and assembly as guaranteed by the Constitution of the United States. Plaintiff UNITED FARM WORKERS NATIONAL UNION and its agents and employees desire to continue to organize and participate in strikes, boycotts, peaceful picketing, collective bargaining and other concerted activities in support of such Union's demands for collective bargaining with agricultural employers in Arizona and elsewhere.

Defendants herein are the officials of the state of Arizona who are charged by the statute with the enforcement of the above Arizona Agricultural Employment Relations Act. These officials, including the defendant members of the Board, have begun to enforce the provisions of the Act against the Plaintiffs herein by the issuance of an unfair labor practice complaint directed against their boycott activities on

August 14, 1973. [See Exhibit "B"] These same defendants have threatened to continue such enforcement, and the plaintiffs are informed and believe and thereupon allege, will continue such enforcement against the plaintiffs in the near future unless enjoined by this Court as hereinafter prayed.

Such enforcement will cause plaintiffs severe, immediate and irreparable injury through deprivation of their constitutional rights, privileges and immunities as set forth above in Paragraphs 9 through 14. Such enforcement will diminish plaintiffs' rights of speech and association, deny opportunities to take part in meaningful collective bargaining and will disrupt existing bargaining relationships. It will decrease membership in the plaintiff Union and act to disrupt present harmonious relations between plaintiff employees and their employers. Enforcement of the Act, in fact, threatens the entire system of collective bargaining the plaintiffs have participated in and desire to continue to participate in. Such enforcement will also subject the plaintiffs to an unnecessary and harrassive multiplicity of suits and hearings. Damage to the above system and relationships will be irrevocable. There is no administrative remedy or remedy at law available to plaintiffs which will adequately vindicate such rights.

WHEREFORE, Plaintiffs pray that a three-judge court be convened pursuant to 28 U.S.C. 2281 and 2284 to hear and determine this action, that the cause be expedited and heard at the earliest date, and that this Court:

1. After hearing, issue a preliminary injunction against defendants and each of them, their agents and successors in office, and all other persons acting in concert with them, pending final determination of this action, from enforcing against plaintiffs and their class or in any other manner giving effect to, directly or indirectly the provisions of the Arizona Agricultural Employment Relations Act, Arizona Revised Statutes, Title 23, Ch. 8, Art. 5, Sections 23-1381 through 23-1395, including but not limited to enjoining the defendant members of the Board, their agents and staff from:

a) filing any future unfair labor practice complaints against the plaintiffs;

b) investigating or conducting hearings on unfair labor practice charges;

c) calling or conducting representation elections pursuant to 23-1389; and

d) initiating any civil or criminal proceedings in the superior court to enforce provisions of the Act.

2. Issue a permanent injunction restraining the defendants and each of them, their agents and successors in office, and all other persons acting in concert with them, from enforcing against plaintiffs and their class or in any other manner giving effect to directly or indirectly, the provisions of the aforesaid Arizona Agricultural Employment Relations Act.

3. Issue a declaratory judgment pursuant to 28 U.S.C. 2201 and 2202, adjudging and declaring that the provisions of the aforesaid Arizona Agricultural Employment Relations Act are null and void on their fact as violative of the free speech and assembly provi-

sions of the First Amendment to the United States Constitution, the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, the "supremacy" provisions of Article VI, Cl. 2 of the United States Constitution, the "commerce" provisions of Article I, Sec. 8, Cl. 3 of the United States Constitution, and Article I, Sec. 10 of the United States Constitution.

4. Award the plaintiffs their costs of suit herein, including reasonable attorneys fees.

5. Grant such other and further relief as it may deem just and appropriate.

COHEN, CARDER,
ENGELHARDT & RUTKOWSKI

By: _____
James Rutkowski

Dated: Aug. 27th, 1973

VERIFICATION

STATE OF ARIZONA }
County of Maricopa } ss

RICHARD B. COOK, being first duly sworn according to law, deposes and says:

That he is the Director of the United Farm Workers National Union in the state of Arizona and is authorized to make this verification on its behalf;

That from his knowledge of the above Act and of the mobile status of most Arizona farm workers, he knows it will be extremely difficult and in many cases virtually impossible for those workers to be able to participate in any meaningful or successful way in the election and hearing procedures established by the Act.

That the Act's restrictions on picketing, boycotting and collective bargaining activities deny the plaintiff Union the effective use of these vital and essential economic labor tools in establishing a meaningful bargaining position with agricultural employers.

That without this effective bargaining position it is impossible to obtain any benefits regarding wages, hours and working conditions for the employees the Union represents.

That the application of the Act has already had a seriously damaging effect on the organizing activities of the plaintiff Union in Arizona and that continued enforcement will further result in the loss of organizing advances that will not be able to be regained.

That the Union boycott activities have been and are being impaired by the application of the Act. Many people who are assisting in the boycott activities have unduly refrained from saying many things that they otherwise would in support of the boycott for fear of prosecution under the Act. Some people who have helped in these activities in the past have refrained from the current boycott efforts altogether for fear of incurring civil liability or criminal sanctions.

The provisions of the challenged Act have been used in several lawsuits during the past few months to restrict the Union's strike and boycott activities. The defendant Board herein has filed charges against the Plaintiff Union based on the Act and the affiant believes will continue to file similar complaints from agricultural employers and others.

That in some of the above suits the enforcement of the Act has resulted in the enjoining of some speech activity that the affiant believes is protected by the First Amendment to the United States Constitution.

That this application and enforcement of the Act is already and will continue to diminish the plaintiffs rights of speech and association, deny opportunities to take part in meaningful collective bargaining and is disrupting existing bargaining relationships. It will decrease membership in the plaintiff Union and is disrupting present harmonious relations between plaintiff employees and their employers. Enforcement of the Act is threatening the entire system of collective bargaining the plaintiffs have participated in and desire to continue to participate in. Such enforcement is also subjecting the plaintiff Union and plaintiff workers to many lawsuits and administrative hearings which they have neither the time nor money for legal services to participate in. Continued enforcement of the Act will make it impossible to repair the damage already done to the plaintiffs' organizing efforts.

Richard B. Cook

(Jurat Omitted in Printing)

DEFENDANTS' MOTION TO DISMISS AND RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Filed October 1, 1973

(Title Omitted in Printing)

Defendants herein interpose the following Memorandum in opposition to the Plaintiffs' Motion for Preliminary Injunction and Motion to Dismiss on the doctrine of latches.

Respectfully submitted this 1 day of October, 1973.

GARY K. NELSON
The Attorney General

MICHAEL S. FLAM

JAMES B. FEELEY
Assistant Attorneys General
1717 W. Jefferson, Phoenix, Arizona
Attorneys for Defendants

MEMORANDUM

This action was originally filed on August 14, 1972. In their Complaint the Plaintiffs prayed for a preliminary injunction (1) interdicting enforcement of the Arizona Agricultural Employment Relations Act against the Farm Labor Union and field workers, (2) preventing the Governor from appointing the Agricultural Employment Relations Board and (3) appointing General Counsel to the Board. Permanent injunctive

relief was also prayed for against Arizona's Attorney General, Treasurer, and Finance Commissioner presumably to prevent funding of the duties required to be carried out under the Act. They further sought a declaration of the Act's unconstitutionality as a whole.

The carnival-like atmosphere and inspirational renderings to the media attendant to the filing of the original complaint appeared to be the harbinger of vigorous litigation. Plaintiffs' opening volley was followed by an apparent cancellation not only of the battle but the war as well. The original complaint was never served upon Defendants. Months passed. Plaintiffs seemed to have lost interest and the imminence of litigation faded away.

By October the likelihood of this action being pursued seemed remote. The road seemed to be clearing for the Board to secure staff to exercise its statutory authority. A.R.S. § 23-1388. Appointment of an Executive Secretary who proceeded to build an administrative staff prompted no reaction from the Plaintiffs. With the appointment of General Counsel, the Board was ready to begin functioning by December. The Plaintiffs continued their silence. Not even the filing of charges of unfair labor practices moved them to action. The Board continued to function at a public expense of approximately $68,000 through August of 1973. On the 29th day of that month the United Farm Workers National Union served its Amended Complaint.

A state of facts where the plaintiff has been dilatory and because of the delay the other party has reasonably changed his position to his detriment is appropriate for invoking the doctrine of latches. *Jerger*

v. Rubin, 106 Ariz. 114, 471 P.2d 726 (1970). After bringing suit requesting preliminary injunctive relief, which as one of its prerequisites requires the imminence of irrevocable har, (sic) 190 F.2d 601 (1951), the plaintiffs neglected to even attempt service. Defendants' only notice of the action's existence was through the public information media. Based on this half-hearted beginning, followed by over a year of silence, the Defendants felt safe in carrying out the mandate of A.R.S. § 23-1381 et seq. Had there been any interest shown by the Plaintiffs, the State would have stayed its hand to avoid possible conflict with this Court. Because of Plaintiffs' lack of diligence in their own law suit the acts and very existence of a state agency, even its authority to have spent over $68,000 is now drawn into question. There is no reason for the Plaintiffs' delay. Likewise, there is no reason for the people of Arizona — particularly all sectors of the farming community — to bear the burden and expense of the United Farm Workers National Union's inaction. Arizona law requires application of the doctrine of laches in this case. See especially *Barr v. Petzhold*, 77 Ariz. 399, 273 P.2d 161 (1954); *Felix v. Superior Court of Pima County*, 92 Ariz. 247, 375 P.2d 730 (1962).

GARY K. NELSON
The Attorney General

MICHAEL S. FLAM

JAMES B. FEELEY
Assistant Attorneys General

1717 W. Jefferson, Phoenix, Arizona
Attorneys for Defendants

(Affidavit of Service Omitted in Printing)

ORDER FOR INTERVENTION
(Title Omitted in Printing)

A Motion for Intervention, pursuant to Rule 24(a), Federal Rules of Civil Procedure, having been filed by ARIZONA FARM BUREAU FEDERATION, an Arizona corporation; ARIZONA GRAPE GROWERS' ASSOCIATION, an Arizona corporation; VEGETABLE GROWERS ASSOCIATION, an Arizona corporation, and YUMA CITRUS SHIPPERS' ASSOCIATION, an unincorporated association;

Memoranda having been filed by the parties, and oral argument having been heard on November 5, 1973, and good cause appearing therefor;

IT IS HEREBY ORDERED PERMITTING THE INTERVENOR-APPLICANTS TO INTERVENE AS PARTY DEFENDANTS IN THIS ACTION.

DONE this 5th day of November, 1973.

Judge Carl A. Muecke

(Affidavit of Service Omitted in Printing)

ANSWER OF INTERVENOR-APPLICANTS AND RESPONSE TO APPLICATION FOR THREE JUDGE COURT
Filed October 1, 1973
(Title Omitted in Printing)

In answer to plaintiffs' Complaint, intervenor-applicants admit, deny and allege as follows:

I

Deny each and every allegation not specifically admitted herein.

II

Allege that the plaintiffs' Complaint fails to state a claim upon which relief can be granted.

III

Allege that this Court lacks jurisdiction over the subject matter.

IV

Allege insufficiency of service in that the Complaint was not served within one year as is required by Rule 38, Rules of Practice in the United States District Court for the District of Arizona, and that the Complaint should be dismissed therefor.

V

Allege that the Complaint should be dismissed for failure to allege the requisite jurisdictional amount required by 28 U.S.C. § 1331.

VI

Answering paragraph I, admit the statement of the nature of the Complaint, but deny the existence of jurisdiction under any of the statutes enumerated therein.

VII

Answering paragraph II, admit that the ultimate issue of this case would be properly determined by a Three Judge Court.

VIII

Answering paragraphs III, IV and V state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

IX

Answering paragraph VI deny the allegations therein.

X

Answering paragraph VII allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

XI

Answering paragraphs VIII and IX admit the allegations therein.

XII

Answering paragraphs, X, XI, XII, XIII and XIV deny the allegations therein.

XIII

Answering paragraph XV allege that as to the first paragraph thereof they they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein; admit the allegations in the second paragraph thereof; and deny the allegations in the third paragraph thereof.

WHEREFORE, intervenor-applicants pray:

1. That the plaintiffs' Complaint be dismissed and no relief be granted thereof;

2. That no preliminary or permanent injunction be issued upon plaintiffs' Complaint;

3. In the alternative to the dismissal of the plaintiffs' Complaint, pray for a declaratory judgment adjudging and declaring that the provisions of the Arizona Agricultural Employment Relations Act are valid and constitutional;

4. For such other and further relief as the Court may deem just in the premises.

Respectfully submitted,
JENNINGS, STROUSS & SALMON

By _____
Jon L. Kyl

(Affidavit of Service Omitted in Printing)

ORDER DENYING MOTION TO DISMISS AND IMPANELING THREE-JUDGE COURT
(Title Omitted in Printing)

The Court having considered the defendants' motions to dismiss, and the plaintiffs' motion for a preliminary injunction and application for a three-judge court pursuant to Title 28 U.S.C. §§ 2281 and 2284, and the responses thereto, and the parties having appeared and argued these motions orally,

IT IS HEREBY ORDERED that the defendants' motions to dismiss are denied and the plaintiffs' motion for a preliminary injunction is denied.

IT IS FURTHER ORDERED that a three-judge court be impaneled pursuant to Title 28 U.S.C. §§ 2281 and 2284.

IT IS FURTHER ORDERED that the parties shall hereafter file an original and four copies of all their pleadings with the Clerk of the Court.

The parties will be notified when and where the three-judge court will be convened to conduct further hearings in this matter. All memoranda previously filed by the parties may be copied and used in support of any motions or other pleadings filed by the parties, directed to the three-judge court.

The Court will also notify the parties of any pre-trial hearings to be conducted to delineate the issues to be heard at any hearing that may be conducted, to reduce and simplify the issues, to list witnesses and exhibits, if any there be, and to prepare for a hearing

by following the procedure outlined in Local Rule 42, as much as this is determined to be necessary by the Court.

In the event of a hearing, the parties are requested to see if they can agree that such a hearing shall deal with whether or not a permanent injunction should or should not issue, not just a temporary one. This is suggested by the Court because this practice was proven to be useful in other similar cases where only one hearing was required to be held instead of two.

DATED this 24th day of October, 1974 at Phoenix, Arizona.

C. A. Muecke
United States District Judge

Copy of foregoing mailed this
25th day of October, 1974 to:

Cohen Carder Engelhardt & Rutkowski
Bruce Meyerson
The Attorney General
Office of the Governor
Jennings Strouss & Salmon

ORDER DESIGNATING UNITED STATES CIRCUIT JUDGE AND UNITED STATES DISTRICT JUDGES PURSUANT TO § 2284, TITLE 28, UNITED STATES CODE

Whereas in my judgment the public interest so requires, I, pursuant to the provisions of § 2284, Title 28, United States Code, do hereby designate and appoint the

HONORABLE OZELL M. TRASK,

United States Circuit Judge for the Ninth Circuit, and the

HONORABLE WALTER E. CRAIG

and the

HONORABLE C. A. MUECKE,

United States District Judges for the District of Arizona, to hold court for the District of Arizona at a time and place to be agreed upon by said judges, and to hear and determine the following cause:

United Farm Workers National Union, etc.,
v. Jack Williams, Governor, etc., Civ. 72-445
PHX - CAM,

and all motions and proceedings therein.

DATED: October 29, 1974.

Chief Judge, Ninth Circuit

cc: Judge Trask
cc: Judge Craig
cc: Judge Muecke
cc: Clerk, Ariz.
cc: Clerk, 9 CA

ANSWER OF DEFENDANTS GENE BLAKE, WILLIAM S. BOICE, JOHN L. CONSAUL, JACK MONTGOMERY, JACK MC MANUS, MILTON G. SANDERS, JESSE A. UDALL AND JACK D. WILLIAMS, INDIVIDUALLY AND AS MEMBERS OF THE ARIZONA AGRICULTURAL EMPLOYMENT RELATIONS BOARD

Filed November 4, 1974

(Title Omitted in Printing)

Comes now defendants GENE BLAKE, WILLIAM S. BOICE, JOHN L. CONSAUL, JACK MONTGOMERY, JACK MC MANUS, MILTON G. SANDERS, JESSE A. UDALL and JACK D. WILLIAMS, individually and as members of the Arizona Agricultural Employment Relations Board, by and thru Robert E. Dickelman, General Counsel to the Board, answering the Complaint in the above captioned case, admitting, denying and alleging as follows:

1.

Above defendants deny the allegations contained in paragraphs 1 and 2 of said Complaint.

2.

Are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraphs 3, 4, 5, 6 and 7 of said Complaint and therefore deny the allegations contained therein.

3.

Admit the allegations contained in paragraphs 8 and 9, except for the allegations in paragraph 8, lines 14, 19, 21, and 26, that allege respectively, that Gary Nelson is the Attorney General of the State of Arizona; that Jesse A. Udall is a member of the Agricultural Employment Relations Board; that Jack Doe Williams is Executive Secretary of that Board; and that Ernest Garfield is the Treasurer of the State of Arizona; which are denied.

4.

Deny the truth of each and every allegation contained in paragraphs 10, 11, 12, 13, and 14, and each and every sub-paragraph thereto.

5.

Are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 15, lines 17 thru 26, and therefore deny the allegations contained therein; admit the allegations contained in paragraph 15, lines 27 thru 32, page 12 and lines 1 thru 6, page 13; and deny the truth of the allegations contained in paragraph 15, lines 7 thru 23, page 13.

AFFIRMATIVE DEFENSES

By way of Affirmative Defenses, the above Defendants allege:

6.

That Plaintiffs fail to state a claim upon which relief can be granted.

7.

That this Court is without jurisdiction over the subject matter.

8.

That Plaintiffs are without standing before this Court.

9.

That this action is premature and not ripe for adjudication by this Court.

10.

That Plaintiffs fail to allege an act or omission by Defendants upon which jurisdiction of this Court can be predicated.

WHEREFORE, the above named Defendants pray:

1. That the Plaintiffs' Complaint be dismissed and no relief be granted thereof;

2. For such other and further relief as the Court may deem just and proper.

Respectively submitted this 4th day of November, 1974.

Robert E. Dickelman
General Counsel
Agricultural Employment
Relations Board

(Affidavit of Service Omitted in Printing)

ANSWER OF DEFENDANTS JACK WILLIAMS, GOVERNOR OF THE STATE OF ARIZONA, GARY NELSON, ATTORNEY GENERAL, ERNEST GARFIELD, TREASURER, AND TED G. HAWKINS, FINANCE COMMISSIONER

Filed November 4, 1974

(Title Omitted in Printing)

For their Answer, Defendants admit, deny and allege as follows:

I.

The Defendants admit Paragraphs III, IX, VIII of Plaintiffs' First Amended Complaint; except that they deny that Gary K. Nelson is the Attorney General of the State of Arizona, that Ernest Garfield is the Treasurer of the State of Arizona and that Jesse A. Udall is a member of the Agricultural Employment Relations Board. The Defendants further admit lines 28-32 appearing on Page 1 of Paragraph I, and lines 27-32 appearing on Page 12 and line 1 appearing on Page 13 of Paragraph XV.

II.

The Defendants deny the following portions of the Plaintiffs' First Amended Complaint: lines 1-9 appearing on Page 2 of Paragraph I, Paragraph II, VI, X, XI, XII, XIII and lines 2-28 of Paragraph XV appearing on Page 13.

III.

The following parts of the Paintiffs' First Amended Complaint are denied for the reason that Defendants do not have sufficient information upon which to form

a belief as to the truth or falsity of the allegations: Paragraph IV, V, VII and lines 17-26 of Paragraph XV appearing on Page 12 of the Complaint.

IV.

All allegations not hereinbefore explicitly admitted or denied are hereby denied.

V.

AFFIRMATIVE DEFENSES

1. The Court lacks jurisdiction over the subject matter;

2. The Complaint fails to state a claim upon which relief can be granted:

3. The Plaintiffs have failed to allege any act or omission undertaken by the Defendants in their individual capacity and therefore have failed to state a claim against any of the Defendants individually;

4. The Plaintiffs are without standing to bring this action;

5. The claim sought to be stated is premature and abstract and therefore not ripe for adjudication;

6. The claim sought to be stated is a proper one for invoking the doctrine of abstention.

RESPECTFULLY submitted this 4th day of November, 1974.

N. WARNER LEE
The Attorney General

JAMES B. FEELEY
Assistant Attorney General

STATE OF ARIZONA }
County of Maricopa } ss

JAMES B. FEELEY, being first duly sworn, upon his oath deposes and says:

That he is the attorney for the Defendants and that he makes this verification for and on behalf of said Defendants, being acquainted with the facts.

Affiant further states that he has read the above and foregoing Answer and knows the contents thereof; that the same is true of his own personal knowledge except as to those statements made therein upon information and belief and as to those, he believes them to be true.

JAMES B. FEELEY

(Jurat and Affidavit of Service Omitted in Printing)

AMENDED ORDER DESIGNATING UNITED STATES CIRCUIT JUDGE AND UNITED STATES DISTRICT JUDGES PURSUANT TO § 2284, TITLE 28, UNITED STATES CODE

Whereas in my judgment the public interest so requires, I, pursuant to the provisions of § 2284, Title 28, United States Code, do hereby designate and appoint the

HONORABLE JOHN F. KILKENNY,

United States Circuit Judge for the Ninth Circuit, and the

HONORABLE WALTER E. CRAIG

and the

HONORABLE C. A. MUECKE,

United States District Judges for the District of Arizona, to hold district court for the District of Arizona at a time and place to be agreed upon by said judges, and to hear and determine the following cause:

United Farm Workers National Union, etc.,
v. Jack Williams, Governor, etc., Civ. 72-445
PHX - CAM,

and all motions and proceedings therein.

This order revokes and supersedes my order of October 29, 1974, and replaces the Honorable Ozell M. Trask, who has recused himself, with the Honorable John F. Kilkenny.

DATED: November 11, 1974.

Chief Judge, Ninth Circuit

IM
cc: Judge Kilkenny
cc: Judge Muecke

cc: Judge Craig
cc: Clerk, Ariz.
cc: Clerk, 9 CA

ORDER RESERVING RULING ON MOTION TO DISMISS
(Title Omitted in Printing)

The defendants' motion to dismiss filed November 27, 1974, having come on for hearing before the three-judge panel on January 13, 1975, said panel having heard the oral arguments of the parties, enters the following order:

1. Ruling on the defendants' motion to dismiss is reserved.

2. A final hearing to dispose of the case will be set following additional preparation by the parties for such hearing.

3. Supervision of such preparation and a schedule to be followed by the parties in such preparation will be ordered by the judge to whom this case was originally assigned, the Honorable C. A. Muecke.

To that end, a pretrial conference was held with Judge Muecke on January 15, 1975, with the following attorneys present: James Rutkowski for plaintiffs, Michael Flam for Defendant Office of the Attorney General, Robert Dickelman for Defendant Agricultural Employment Relations Board, and Jon Kyl and Charles Jones for Intervenors Arizona Farm Bureau Federation.

The parties agreed at that pretrial conference that a final hearing with the three judges presiding could dispose of this case by way of a ruling on the defendants' motion to dismiss, or cross-motions for

summary judgment, or a trial to the three-judge court, and it is so ordered.

The preparation schedule for such final hearing is ordered as follows:

1. The plaintiffs will formulate all factual issues no later than February 3, 1975.

2. The plaintiffs and the defendants will meet on February 17, 1975, to agree on the stipulated facts and the disputed facts, if any. It is recommended that the parties follow the procedures outlined in Local Court Rule 42A.1.

3. On March 17, 1975 at 2:00 P.M., the parties will hold a pretrial conference with Judge C. A. Muecke to present the facts agreed upon and those contested, if any. If facts are contested, the parties shall submit the names and addresses of the witnesses they propose to call, together with a summary of their proposed testimony, and a list of the exhibits with a brief description. The parties shall also inform the court if they believe any discovery is necessary, and if so, when and how they propose to do it.

The parties shall also discuss with the court the form they believe the pleadings should take to dispose of this case, together with a schedule of time when the pleadings and briefs will be filed.

The parties will inform the court as to their estimate of the time the final hearing will take, and the court will fix a date for such hearing to the convenience of the parties and the three-judge court.

DATED: January ___, 1975.

By: C. A. Muecke
With the approval and consent of
Judges Kilkenny and Craig.

PRE-TRIAL ORDER
(Title Omitted in Printing)

I

This action is one for declaratory and injunctive relief challenging the constitutionality of the Arizona Agricultural Employment Relations Act (Act), in its entirety and its various parts, A.R.S. § 23-1381 *et seq.* (1972).

1. The Plaintiffs are: United Farm Workers National Union, on behalf of itself and its members, Gustavo Gutierrez, an agent of the United Farm Workers National Union in the State of Arizona, Ruben Alaniz and Matilda Varela on behalf of themselves and all others similarly situated, and Wendy Rose, an individual.

2. The Defendants are: Raul Castro, Governor of the State of Arizona, Bruce Babbitt, Attorney General of the State of Arizona, Bart Fleming, Treasurer of the State of Arizona, Raymond Long, Finance Commissioner of the State of Arizona, Gene Blake, William S. Boice, Jack Montgomery, Keith Walton, Jack McManus, Milton G. Sanders, individually and as members of the Arizona Agricultural Labor Relations Board and Theresa Bond, in her capacity as Executive Secretary.

II

3. Plaintiffs contend jurisdiction of this Court is based upon 28 U.S.C. § 1343, 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 *et seq.*

Defendants and Intervenors deny that the Act or any part of it is unconstitutional and contend that the Court should abstain from deciding the issues raised by Plaintiffs or, in the alternative, determine that no justiciable issue has been presented for review.

III

The following facts, offered by the Plaintiffs, are admitted by the parties and require no proof:

1. That there are substantial variations in the length of preparation and harvest seasons from crop to crop plus varying levels of workers employed even within each of these preparations and harvest seasons.
2. That there are substantial variations in preparation and harvest seasons which range from a few weeks to several months.
3. That there are substantial variations in the size of the work force for each preparation and harvest season which range from a few workers to several hundred workers.
4. That the highest number of field workers employed by an agricultural employer are employed during the peak of the harvest season.
5. That the majority of agricultural employees as defined by the Act are directly engaged in the planting, preparation and/or harvesting of row crops, field crops, tree fruits and grapes, as con-

trasted with the much smaller number of agricultural employees engaged in operations related to the raising and caring of cattle, sheep, poultry and other animals and insects.

6. That the function of "stitching" referred to in A.R.S. § 23-1382 1(g), is the assembling of cartons in which produce is to be packed. This function, which occurs during the harvest, generally occurs on the back of a truck or wagon (in the field) and sometimes occurs at a location or facility away from the field and away from the farm. The function of "hauling" referred to in A.R.S. § 23-1382 1(g) is the transporting of produce after it has been harvested. The function of packing agricultural produce may occur in the field or in a shed or facility on or off the farm.

7. A stipulated statement of the status of all matters handled or pending before the Agricultural Employment Relations Board and litigation involving the Act is attached.

IV

The following are the issues of fact Plaintiffs contend should be tried and determined in a trial. For the reasons noted in Paragraph II above, Defendants and Intervenors contend it is not necessary or proper that these issues be tried and determined:

1. That the definition in A.R.S. § 23-1382(1) limits the application of the Act to the occupational class of agricultural employees, which class:

A. Is an occupational category in Arizona with a majority of racial and ethnic minority members;

B. Is composed of one of the highest, if not the highest, percentage of employees from racial and ethnic minorities in comparison to other occupational categories;

C. Is composed of among the lower, if not the lowest, paid workers of any occupational category; and

D. Consists of workers who have historically suffered and now suffer from more social and political discrimination and disadvantage than most, if not all, other occupational categories.

Defendants and Intervenors contend there are two parts to this statement, and that the first is a legal issue. The definition of "employee" in the Act does not "limit" its application, except to the extent that the entire Act is limited to the field of agriculture generally — i.e., it applies to all agricultural employees in Arizona. Further, it is incorrect to say that all agricultural employees are an "occupational class." The definition of "agriculture" in A.R.S. § 23-1382(3), which clarifies the meaning of "agricultural employees" in § 23-1382(1), includes *all* services performed on a farm, as defined in A.R.S. § 23-603; and that definition obviously includes every single aspect of agriculture in the State.

Defendants and Intervenors, therefore, contend the first statement is erroneous; and further deny the four substatements and the relevancy and materiality of all of the statements; and contend the Act essentially covers all of the agricultural employees not covered by the National Labor Relations Act, and all employees working in agriculture in this State. They further contend that whether or not the Arizona Act happens to apply to a majority of people who are racial minorities and are economically, socially and politically "disadvantaged" is irrelevant to the constitutionality of the Act, and, on that basis, moved to exclude testimony going to the racial, ethnic, economic and political composition of the farmworkers.

The Court granted the Motion in Limine by order dated November 29, 1976. The effect of the Court's order is to eliminate presentation of evidence on the issues stated in Paragraph IV 1 and 2 herein. Plaintiffs have filed an offer of proof on the facts contained in both of these Paragraphs, contending they are relevant to equal protection considerations.

2. The Act discriminates against "field workers" by exempting from coverage agricultural workers who pack inside the sheds, assemble the containers in which produce is packed and haul produce [A.R.S. § 23-1382(1) & (1) (g)] in that:

A. Field work has traditionally been the lower social and economic status job among agricultural workers as compared to these exempted categories;

B. Field workers covered by the Act are composed of a higher percentage of racial minorities and are lower paid than the agricultural workers excluded by the Act;

C. Field workers compared to other agricultural workers are more migratory and more politically disadvantaged.

Defendants and Intervenors contend the allegation of discrimination is a statement of law, that the statement is not accurate, relevant or material, and further contend that the statement regarding social and economic status is a matter of opinion not capable of factual determination. They further contend the statement is irrelevant to the constitutionality of the Act. Pursuant to the Court's Order granting the Motion in Limine, *supra*, no evidence will be presented on this statement; and Plaintiffs have filed an offer of proof thereon.

3. A strike or other concerted activity by "stitchers," "haulers," or packing shed employees can interrupt the total process of harvesting, packing and producing agricultural products as would a strike or other concerted activity by field workers.

Defendants and Intervenors contend that the statement is speculative and dependent upon a variety of circumstances, and that a strike by these three groups is probably less disruptive than by those actually harvesting.

4. The majority of agricultural workers, as defined by the Act, are *temporary* and *seasonal* employees. The length of the election and unfair labor practice procedures will often exceed the seasonal periods of

employment for many workers, thereby denying these workers their right to vote and to associate due to:

A. The substantial variations in preparation and harvest seasons which range from a few weeks to several months; and

B. The substantial variations in the size and composition of the work force for each preparation and harvest season which range from a few workers to several hundred.

Defendants and Intervenors contend that the Act will not on its face, or as applied, deny workers the right to associate as alleged and further contend that experience with the Arizona Act has shown that elections and unfair labor practice procedures need not exceed the seasonal periods of employment. They, therefore, contend that the statement is speculative and incorrect and that any evidence relating to such hypothetical statements is conjectural, irrelevant and immaterial.

5. Procedures for establishing recognition of a union in lieu of a valid secret ballot for the purpose of enforcing upon a particular agricultural employer a duty to bargain with a union as the exclusive representative of his agricultural employees are essential to guarantee to agricultural employees their constitutional and statutory rights. These alternative procedures may include, *inter alia,* authorization cards signed by a majority of employees, an informal poll, a union-called strike vote, a strike or recognitional picketing.

Defendants and Intervenors contend the statement is an issue of law, not a statement of fact, does not raise an issue of constitutionality and, therefore, is irrelevant and immaterial to a determination of the issues of the case. They have, therefore, moved to eliminate evidence on the statement.

6. Negotiation in collective bargaining of the topics defined as management rights in A.R.S. § 23-1384 are essential to the formation of a meaningful collective bargaining agreement and for the full protection of rights of agricultural employees.

Defendants and Intervenors contend the statement is not a statement of fact, does not raise an issue of constitutionality and is, therefore, irrelevant and immaterial. Further, certain portions of it are incapable of definition (such as "meaningful bargaining agreement"). Defendants and Intervenors have, therefore, moved to eliminate evidence on the statement.

7. Passage and subsequent enforcement of the AAERA has caused substantial and irreparable harm to the Plaintiffs herein, including the Plaintiff Union, by causing a loss of membership, disruption of bargaining relationships, creation of obstacles to new collective bargaining agreements, and undue restriction and harassment regarding the Plaintiffs' legitimate boycott activities.

Defendants and intervenors contend that some of the allegations contained in the statement are conclusions of law, that the statement is not accurate, relevant or material, and further contend that the

statement is purely speculative and hypothetical since Plaintiff Union has refused to try to operate under the law.

8. There are a substantial number of persons under 16 years of age who are employed as farmworkers by agricultural employers in the planting, cultivating and harvesting of agricultural products.

Defendants and Intervenors deny the statement and contend it raises no constitutional issue in any event.

V

The following are the issues of law to be tried and determined upon trial;

The following list of legal issues follows the allegations set forth in the Amended Complaint of August 27, 1973, beginning with Paragraph 10, page 5.

Each allegation, except for those marked with an asterisk, challenges the constitutionality of the entire Act or specific provision on its face. Although those allegations noted with an asterisk call for some evidence, e.g., the nature of the class regulated, Plaintiffs contend, they are still essentially challenges to the Act as written and not as applied:

*1. The entire Act violates the Equal Protection Clause of the United States Constitution (par.12);

2. The entire Act is unlawful Bill of Attainder (13);

3. § 23-1385 (B) (6) and (7) violates the First Amendment (14A);

4. § 23-1385 (B) (8) violates the First Amendment (14B);

5. § 23-1385 (B) (11) violates the First Amendment (14C);

6. § 23-1385 (B) (12) violates the First Amendment (14C);

7. § 23-1393 (b) violates the First and Fourteenth Amendment (14E);

8. § 23-1385 (b) (13) violates the First and Fourteenth Amendment (14F);

9. § 23-1389 (Representation Elections) violates the First and Fourteenth Amendments (14 G);

10. § 23-1390 (Unfair Labor Practices) violates the Fourteenth Amendment (14H);

11. § 23-1392 violates the First and Fourteenth Amendment (14I);

12. § 23-1385 (c) violates the First Amendment (14J);

*13. §§ 1384 and 1385 (D) violate the First amendment (14K);

14. § 23-1382 (2) violates the Fourteenth Amendment (14L);

15. § 23-1393 (F) violates the Fourteenth Amendment (14M);

16. § 23-1382 (6) violates the First Amendment (14N);

Defendants and Intervenors deny the statements of law set forth by the Plaintiffs and further allege that the Court should abstain from deciding the issues, or, in the alternative, determine that they are not ripe for

review, all as has been set forth in the motions of the Defendants and Intervenors pending before this Court.

Plaintiffs also raise two other legal issues:

17. That this action should be designated a class action, as set forth in Plaintiffs' motion to that effect.

Defendants and Intervenors object to the class action designation for the reasons set forth in their response to Plaintiffs' motion.

18. Plaintiffs submit that some agricultural employees excluded from the AAERA by its exemption for stitchers, haulers and packing shed workers (A.R.S. § 23-1382) are also not subject to the jurisdiction of the National Labor Relations Act. Plaintiffs contend that this blanket exemption from the AAERA of employees engaged in these functions is invidiously discriminatory and not founded on any rational basis, since the excluded employees are similarly situated to those regulated by the Act and can as effectively interrupt the production and harvest of agricultural products as those employees who are covered.

Defendants and Intervenors contend that coverage of employees under the Act can only properly be determined on a case-by-case basis, since each case is different. Employees alleged to be stitchers, haulers or shed workers have been held to be covered by the National Labor Relations Act; others have been excluded from its coverage. Constitutionality of a state statute should not be decided upon hypothetical determinations. Therefore, Defendants and Intervenors contend

that, if, in a given situation, an employee is found to be excluded both from coverage of the NLRA and the AAERA, the legal issue of whether he *should be* covered by the AAERA is one properly raised at that time, under those circumstances and by the one allegedly aggrieved.

Defendants and Intervenors raise the following legal issues:

There are pending and potential state court actions and cases pending before the Agricultural Employment Relations Board which have and will appropriately decide questions of interpretation, application and even constitutionality of portions of the Act; therefore, this Court should abstain from deciding the issues raised by the Plaintiffs in this case. Second, this case does not present any issues which are ripe for review or which present a justiciable case or controversy required under Article III of the United States Constitution — Plaintiff's attack is a broad-based attack on a complex regulatory statute on purely hypothetical grounds, which, as a matter of law, this Court should not consider.

Plaintiffs contend that abstention is not appropriate; that the federal courts are still the primary forum for the vindication of federal rights and parties need not exhaust state remedies before approaching that forum. Furthermore, Plaintiffs contend it is established that cases raising civil rights and fundamental constitutional issues are the least appropriate for abstention; and that the federal Declaratory Judgment

Act was designed to allow for the determination of all rights in a single action rather than force parties to test those rights through continuous litigation.

Plaintiffs also contend the active enforcement of this Act against the Plaintiffs herein both in the courts and before the Defendant Board, as well as the constant threat of its enforcement against their strike and boycott activities has been more than sufficient to establish the requisite controversy and justiciability.

VI

Plaintiffs list the following exhibits, all or some of which may be offered for introduction at the trial of this case. Defendants and Intervenors stipulate to the admissibility of all Plaintiffs' proposed exhibits as to proper foundation. Defendant and Intervenors object to all exhibits offered by Plaintiffs on the grounds that they are irrelevant and immaterial to any issue in the lawsuit, in that they do not relate to any issue which is ripe for review or which presents a justiciable case or controversy. Further, Exhibits 2 and 4 are prejudicial, containing material which has been eliminated by the granting of the Motion in Limine; and No. 2 is irrelevant and not probative on the issue for which it is presented, i.e., fact statement 8.

1. 1974 Arizona Agricultural Statistics, p. 1 compiled by:
   Arizona Crop and Livestock Reporting Service, a cooperative function of:
   A. The University of Arizona; and
   B. U. S. Department of Agriculture.

2. Median family income of farm wageworker households. USDA Agricultural Report No. 251 (1971), p. 8.

3. In-season Farm Labor Reports (Arizona)
   U. S. Department of Labor (Bureau of Employment Security)
   Form ES-223 (Arizona) February 1974 — February 1976 particularly for Maricopa, Pinal and Yuma Counties.

4. Department of Labor, Manpower Administration "Inter Area Manpower Comparison" for the nation and the following states among others:

Arizona	California
Texas	Georgia
Florida	North Carolina

Defendents and Intervenors list the following exhibits, all or some of which may be offered for introduction at the trial of this case.

Plaintiffs stipulate to the admissibility of all of Defendants' and Intervenors' exhibits and to the relevancy of all the exhibits.

1. Agricultural Employment in Arizona since 1950; Arizona State Employment Service affiliated with U. S. Department Service; March 1968 (added to 1973);

2. Arizona Labor Force Data, January to December, 1974;

3. Arizona Agricultural Statistics, 1974*;
   Arizona Crop and Livestock Reporting Service, March, 1975; only back cover and identification page.

4. In-Season Farm Labor Report (Arizona)
   U. S. Department of Labor (Bureau of Employment Security); Form ES-223 for Selected Counties and Dates.

5. Seasonal Agricultural Labor Use for 1974 by Month; Form ES-223 Reports.

VII

The following witnesses may be called by the Plaintiff to testify at the trial of this case:

1. Mr. Cesar Chavez, P. O. Box 62, Keene, California;

2. Mr. Gustavo Gutierrez, 309 Beck, Tempe, Arizona;

3. Mr. Lupe Sanchez, 2108 East Lemon, Tempe, Arizona;

4. Dr. Marshall Berry, 519 Boshporus Avenue, Tampa, Florida; and

5. Mr. Stan Lubin, 3003 North Central Avenue, Phoenix, Arizona.

The following witnesses may be called by Defendants and/or Intervenors as witnesses at the trial of this case:

1. Scott Chadwick, Employer Service Representative, P. O. Box 6123, Phoenix, Arizona 85005;

2. William Foster, Cost Center Manager, Department of Economic Security, P. O. Box 6123, Phoenix, Arizona 85005;

3. Ralph Bodine, 2321 East Highland Avenue, Phoenix, Arizona;

4. Leroy Bridges, 2238 North 10th Street, Phoenix, Arizona;

5. Charles Roberts, Personnel Manager of Shamrock Dairy, 2228 North Black Canyon, Phoenix, Arizona;

6. H. S. Raymond, P. O. Box 709, Sun City, Arizona, 85351;

7. Paul G. Hunter, 715 West Rancho Drive, Phoenix, Arizona;

8. Robert Dickelman, 6429 East Camino Santo, Phoenix, Arizona;

9. Rose Lopez, 6819 West Northern, Glendale, Arizona, 85301;

10. James Cherry, 1402 West Palmaire Road, Phoenix, Arizona;

11. Dr. George Campbell, 2742 North Indian Ruins Road, Tucson, Arizona, 85715.

VIII

Pursuant to the Court's suggestion, the parties are exploring the possibility of presenting evidence as to the length and characteristics of harvest and preharvest seasons by stipulation. The parties may, therefore, request amendment of this order prior to the trial to add such a stipulation. In the event a stipulation is not reached, Defendants and Intervenors may request that employee information obtained from representa-

tive employers be made a part of the record, and Plaintiffs reserve the right to object to that request.

DATED this 11th day of January, 1977.

Respectfully submitted,
JENNINGS, STROUSS & SALMON

By /s/
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Larry L. Smith
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Phoenix, AZ 85003
Attorneys for Intervenors

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AGRICULTURAL EMPLOYMENT LABOR RELATIONS BOARD

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/s/
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633 South Shatto Place
Los Angeles, California 90005

STIPULATED STATEMENT OF STATUS OF PAST AND PENDING ACTIONS TAKEN IN ACCORDANCE WITH THE AGRICULTURAL EMPLOYMENT RELATIONS ACT FILED JANUARY 21, 1977

1. *D'Arrigo Brothers v. United Farm Workers, et al.*, Pinal County, No. C26803: On April 4, 1973, agricultural employer filed suit to restrict picketing and other Union activities at his ranch. A Temporary Restraining Order was obtained without notice; Section 23-1393(B) of the Act was not relied upon. A preliminary injunction was sought on both the common law

mass-picketing theory and § 23-1385(B)(10) of the Act. After a hearing, a preliminary injunction was entered, modifying the TRO and limiting the number of pickets. The Order does not indicate whether it was based on common law or A.R.S. § 23-1393.

2. On June 12, 1973, *Safeway Stores, Inc. v. United Farm Workers, et al.*, Maricopa County, No. C278338: Retail grocery chain filed suit against the United Farm Workers alleging violations of various provisions of A.R.S. § 23-1385(B) of AAERA for Union's boycott activities conducted at several Safeway stores.

A. On June 22, 1973, the Hon. Charles Hardy issued a preliminary injunction prohibiting the Union and persons acting on its behalf from encouraging persons not to patronize Safeway stores whether by a picket sign, a handbill or oral conversation, but permitting continuation of the Union's boycott of non-UFW Union produce by the same methods. Union activity under A.R.S. § 23-1385(B)(7) was not restricted because of the court's finding that the subsection was unconstitutionally vague. The Order and opinion are attached as Exhibit 2A to this Stipulation.

B. On July 20, 1973, Judge Hardy modified his first Order by limiting the number of pickets at each Safeway store and removing restrictions on communication by individual Union members with individual customers. (Exhibit 2B)

C. On October 3, 1973, the Court modified its second Order at the request of Safeway stores to restate essentially the same terms as the first Order based upon a trespass theory and a second boycott theory. (Exhibit 2C)

D. Safeway then alleged violation of this October 3rd Order and served an Order to Show Cause why the Union and several of its supporters should not be held in contempt. After a hearing of this Order to Show Cause, the Court's Order was again modified on December 13, 1973, clarifying the restrictions on the use of handbills, signs and conversations when communicating with customers. (Exhibit 2D)

E. On February 24, 1974, the parties stipulated to a permanent injunction finalizing the Court's Order of December 13. (Exhibit 2E) Copies of each of the above Orders have already been attached as exhibits to Defendants-Intervenors' Motion to Dismiss of November 28, 1975.

F. *Agricultural Employment Relations Board, Case No. 3-673:* On August 14, 1973, the Agricultural Employment Relations Board filed a charge against the United Farm Workers of America alleging violations of A.R.S. § 23-1385(B)(6)(7) and (8), because of the Union's boycott activities at Safeway stores. The Union moved that the Board dismiss the charge on the grounds that the same dispute had been litigated and decided by the Arizona Superior Court in *Safeway Stores, Inc. v. United Farm Workers,* (Exh. 2A-E supra.) This Motion was denied and the Board scheduled a hearing on this case. The Arizona Superior Court,

on motion of the Union, enjoined the Board from conducting a hearing in the matter on the ground that the Superior Court had assumed exclusive jurisdiction of the dispute in *Safeway Stores v. UFW* and the matter was res judicata. The Superior Court decision was affirmed by the Arizona Court of Appeals in *Agricultural Employment Relations Board v. UFW*, 26 Ariz.App. 336, 548 P.2d 429 (1976).

3. In March of 1974, *Q. V. Distributors, Inc. v. United Farm Workers, et al.*, Maricopa County No. C289128: Wholesale liquor distributor sued United Farm Workers Union alleging violation of A.R.S. § 23-1385(B) and § 23-1323 for Union's boycott of Gallo wines at various Arizona liquor retailers. Court dismissed action for reasons that liquor distributor did not have standing to complain of the alleged violations.

4. *On November 12, 1974, Teamsters' Local 274 filed,* with the Agricultural Employment Relations Board, a petition for a representation election at Bodine Produce Company, Inc., EverKrisp Vegetables, Inc., Tanita Farms and *Cook Produce.* (Full Election Records are attached as Exhibit 4)

A. Pursuant to the Agreement of Consent Election entered into by Teamsters' Local 274 and Cook Produce on November 20, 1974, an election was conducted by the Agricultural Employment Relations Board on November 27, 1974. The result

of this election was in favor of "No Union". Teamsters' Local 274 received 2 votes and "No Union" received 43 votes.

B. Bodine Produce Company, Inc., EverKrisp Vegetables, Inc. and Tanita Farms, challenged the initial determination that they, rather than a particular labor contractor, were the employers of the petitioning persons. A formal hearing was held on November 25, 1974. Between November 25 and December 5, 1974, the Board determined that Bodine Produce Company, Inc., EverKrisp Vegetables, Inc. and Tanita Farms were the employers of the particular persons petitioning for election within the meaning of the Act and ordered further hearings to determine if there was a sufficient showing of interest at each farm to order an election.

C. As a result of the proceedings ordered by the Board, it was determined on December 6, 1974, that there was not a sufficient showing of interest as to Tanita Farms and therefore, the petition for a representation election at Tanita Farms was, therefore, dismissed under A.R.S. § 23-1389(C)(1); and Teamsters' Local 274 withdrew its petitions for representation elections at EverKrisp Vegetables, Inc. and Bodine Produce Company, Inc.

5. On November 22, 1974, Teamsters' Local 274 filed, with the Agricultural Employment Relations Board, a petition for a representation election at Cactus Distributors, Inc. As a result of a hearing on December 3, 1974, and decision of the Agricultural Employment Relations Board on December 4, 1974, the showing of interest submitted by Teamsters' Local

274 in its petition for representation election at Cactus Distributors, Inc., was deemed valid and an election was directed to be conducted on December 17, 1974, pursuant to A.R.S. § 23-1389(D). On December 6, 1974, the Union withdrew its petition for representation election.

6. On December 3, 1974, J. A. Wood Company filed a petition for an election alleging certain primary and secondary picketing activity by the Teamsters' Union which demanded recognition and the renewal of a contract with the company. A hearing was scheduled for December 11, 1974, but not held. The petition was withdrawn on December 17, 1974, by J. A. Wood Company. No election was scheduled or held. (Exhibit 6)

7. *Kennard, et al. v. United Farm Workers, et al.*, Maricopa County, No. C294873: Numerous liquor retailers filed suit against the United Farm Workers and several of its supporters alleging violation of § 23-1385(B) of the AAERA because of the Union's boycott of wines at their establishments. A Temporary Restraining Order was issued without notice. Defendants' later Motion to Quash due to insufficiency of service was granted but new service has not been made.

8. On March 25, 1975, while Teamster Union members were engaging in recognitional picketing, G & S Produce filed with the Agricultural Employment Relations Board a petition for a representation election. A hearing was scheduled for April 1, 1975, but was not held. On March 28, 1975, the petition was withdrawn by G & S Produce. (Exhibit 8)

9. On April 11, 1975, Teamsters' Local 310 filed, with the Agricultural Employment Relations Board, a petition for a representation election at Shamrock Farms. A hearing was scheduled for April 22, 1975. An Agreement for a Consent Election was reached by the parties and was approved by the Board on May 5, 1975. This election was held on May 21, 1975. The Teamsters' Local 310 received 4 votes and "No Union" received 25 votes. (Exhibit 9)

10. On May 23, 1975, Laborers' Local 479 filed, with the Agricultural Employment Relations Board, a petition for a representation election at Olson Dairy. A hearing was held on June 2, 1975. An Agreement for a Consent Election was reached by the parties and approved by the Board at the hearing. This election was held on June 22, 1975. Laborers' Local 479 received 5 votes and "No Union" received 2 votes. (Exhibit 10)

11. *Agricultural Employment Relations Board v.United Farm Workers,* Case Nos.: C2-175, C3-175, C4-175, C5-175, C6-175, C7-175 and C8-175. Seven charges were filed by retail liquor outlets in Tucson, Arizona. After investigation by the Board, it was determined that the evidence supported only five of those charges, and the Board brought actions on those five charges. The complaints charged the Union with certain unfair labor practices in violation of A.R.S. § 23-1385(B)(6) and § 23-1385(B)(7). (Case No. C6-175 was subsequently withdrawn and dismissed due to lack of cooperation and interest by the charging party).

A. The Union moved to dismiss the above described cases on the grounds of stare decisis (see paragraph 2 above) and first amendment violations. A hearing was held on April 17, 1975. The

trial examiner, James Cherry, denied the Union's Motion in a decision dated April 23, 1975, attached hereto as Exhibit 11A.

B. A hearing on the merits was held on May 28, 1975, before Trial Examiner James Cherry. The Union declined to appear contending that the Superior Court had assumed exclusive jurisdiction because of the existence of a class action involving similar allegations which was filed in Pima County Superior Court on May 22, 1975. The class action had been brought by a number of Arizona liquor outlets (including those stores discussed in paragrap 11) seeking to enjoin the Union from continuing certain picket activity. The Union contended that the April 3, 1974, Order of Judge Edward Hughes, Maricopa County Superior Court, referred to in paragraph 2F above, was applicable. The Order is attached as Exhibit 11B. The trial examiner proceeded with the hearing based upon the Board's contention that if there were exclusive jurisdiction anywhere, it lay with the Board because the actions were first filed with the Board; and the contention that Judge Hughes' Order of April 3, 1974, had been stayed and was pending before the Court of Appeals.

C. The Agricultural Employment Relations Board proceeded on the merits in the case and the Union filed a Motion before Hon. Judge Edward Hughes for an Order to Show Cause why the Board should not be held in contempt of his Order of April 3rd. Hearing on the show cause Order was held on July 16, 1975, and the Union's Motion was denied by Order dated July 18, 1975. On

July 9, 1975, the trial examiner, James Cherry, rendered his decision on the merits of the Board's complaints enjoining the Union from engaging in the alleged unfair labor practices. (Exhibit 11C)

D. The Union filed, with the Agricultural Employment Relations Board, exceptions to this decision. (Exhibit 11D) On August 13, 1975, the Board modified the trial examiner's decision. (Exhibit 11E) The final Order of the trial examiner and the Board continued to enforce A.R.S. § 23-1385(B)(6) and (7).

12. *Agricultural Employment Relations Board v. United Farm Workers of America,* Pima County, No. 153789: Upon the complaint of the five Tucson liquor stores referred to in paragraph 11 above, the Agricultural Employment Relations Board filed suit against the United Farm Workers alleging improper activity under A.R.S. § 23-1385(B)(6) and (7) of the AAERA and § 23-1321 for the Union's boycott activities at those stores. The Board obtained a Temporary Restraining Order without notice in that action. After a subsequent hearing, the Hon. Lillian Fisher granted, in part, a preliminary injunction on April 4, 1975, which restricted the communications that could be made to liquor store patrons, regardless of how communicated. (Exhibit 12) The position of the Board's counsel in this case and the Board's case in paragraph 11, supra, was that the stores were secondary employers and A.R.S. § 23-1385(B)(6) prohibited picketing, handbilling and conversations which encouraged persons not to patronize them; but permitted such activity if directed against boycotted products.

13. *Kennard, et al. v. United Farm Workers of America, et al.*, Pima County, No. 154758: Numerous liquor retailers and a liquor distributor filed a class action alleging improper activities under A.R.S. § 23-1385(B) and § 23-1323. A Temporary Restraining Order was obtained without notice which restricted picketing the stores alleged to be in the class. After hearing, the case was dismissed as to the liquor distributor on grounds of res judicata (see para. 3, supra.) and as to several of the retailers because they were not properly in the class, but without prejudice to certain other class members to request injunctive relief in accordance with the Order. The request for a preliminary injunction was denied for the remaining plaintiffs because of insufficient evidence.

14. *Agricultural Employment Relations Board v. Rovey Land and Cattle Company*, May 5, 1975, Case Nos.: C9-575, C10-575, C11-575, C12-575 and C13-575, are actions brought on behalf of five members, or former members, of Civil Rights for Farm Workers, who were formerly employed by the respondent. Generally the complaints allege, inter alia, that respondent interferred with the charging party's rights to join, form or organize a labor organization in violation of A.R.S. § 23-1385(A).

This matter was tried before Douglas Leslie, Professor of Law, Arizona State University. A decision was rendered on March 22, 1976, in part granting and in part denying the claim. The decision is attached as Exhibit 14. The Board affirmed the decision of the trial examiner on May 6, 1976.

15. *Agricultural Employment Relations Board v. Olson Dairy*, June 4, 1975, Case Nos: C14-675 and C15-675, are actions brought on behalf of two former employees of respondents who were discharged when new management took over the operations of the dairy. The charging parties allege, inter alia, that their discharge was due to their Union organization activities with Local 479 of the Laborers' Union in violation of A.R.S. § 23-1385(A).

This matter was tried before Raymond Hayes, Esquire, and was dismissed without prejudice.

16. Charge No. C16-675, June 23, 1975, was filed against Vessey Company of Arizona in Marana, Arizona. The charging party alleged that he was discharged due to his organization of efforts with Teamsters' Local 274. An investigation of this matter found that the charge was not supported by evidence sufficient to warrant further action by the Board. The Board, therefore, issued a Notice of Refusal to Issue a Complaint on September 17, 1975.

17. *Agricultural Employment Relations Board v. Rovey Land and Cattle Company*, Case No. C17-1775, is a suit brought on behalf of Spencer Thomas, a former employee of respondent. Since this matter involves similar issues of fact and law as those expressed in the case referred to in paragraph 14 above, the Board is holding this matter in abeyance awaiting the outcome of the prior action.

18. Charge Nos. C18-775, C19-775, C20-775, C21-775, C22-775, C23-775 and C24-775, were filed against the Barkley Company of Arizona with the Agricultural Employment Relations Board on July 8, 1975, by

Teamsters' Local 274 and former employees of respondent. The charges alleged that some of the employees were discharged for signing Union Authorization Cards which were distributed by Local 274 in an effort to obtain a proper showing of interest, in accordance with A.R.S. § 23-1389(C)(1), in order that a petition for a representation election could be filed with the Agricultural Employment Relations Board pursuant to A.R.S. § 23-1389. Pursuant to an investigation, a stipulation and agreement was entered into between the Board and respondent on October 14, 1975, in accordance with Rule 4-205 of the Rules and Regulations of the Agricultural Employment Relations Board.

19. Charge No. C25-976 was filed against Robert L. Saylor Farms located in Glendale, Arizona. The charging party alleged, inter alia, that Respondent had interferred with his rights to join, form and organize a labor organization. A Temporary Restraining Order was granted by the Hon. Robert Pickrell in the Superior Court of Maricopa County on September 12, 1975, enjoining respondent from discharging and evicting the charging party. Pursuant to an investigation, a stipulation and agreement was entered into by the Board and respondent on September 22, 1975, in accordance with 4-205 of the Rules and Regulations of the Agricultural Employment Relations Board.

20. *Warren Page, d/b/a Page's Market and Page's Western Auto v. United Farm Workers, et al.*, Maricopa County, No. C328259: On February 20, 1976, an action based upon provisions of the AAERA and common law was filed by Page's Market to enjoin boycott activity by the Defendant Union against Page's Market and Page's Western Auto: and a Temporary

Restraining Order was granted by Judge Robert Corcoran, Maricopa County Superior Court. On March 1, 1976, an Unfair Labor Practice complaint was filed with the AAERB by Page. The Board deferred action on the complaint pending disposition by Judge Corcoran. On May 1, 1976, Judge Corcoran issued a preliminary injunction prohibiting secondary boycott picketing on their private property. The Order did not prohibit picketing, placards and other forms of expression specifically relating to boycotted products, so long as not conducted on Page premises.

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EXHIBIT 2A

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

SAFEWAY STORES, INC.,
a Maryland corporation,
Plaintiff,
vs.
UNITED FARM WORKERS UNION,
a labor organization;
JOHN DOES 1-100,
Defendants.

No. C-278338
MEMORANDUM
OPINION AND
ORDER

Safeway Stores, Inc. (which hereinafter will be referred to as "Safeway") has applied for a preliminary injunction enjoining the defendant United Farm Workers Union (which hereinafter will be referred to as "the Union") and its members or representatives from picketing or handbilling Safeway stores throughout Arizona, from mass picketing, from threatening or committing acts of intimidation of violence against Safeway or its officers, agents or employees or customers, and from trespasses.

In granting or refusing a preliminary injunction this court must make findings of fact and conclusions of law. The statement of facts and the Court's discussion of law as set forth below may be considered as such

findings and conclusions. Of course, counsel for either side may object to them and may request additional findings or conclusions.

STATEMENT OF FACTS

The Union is a labor organization which seeks to represent agricultural employees in collective bargaining with agricultural employers. Lettuce and grape growers in Arizona and California have recognized the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America as the bargaining agent for their agricultural employees. The Union contends that such recognition is invalid because the employees were never given any choice in the matter and that if elections were held on the issue the overwhelming majority of farm workers would select the Union as their bargaining agent.

This Court can probably take judicial notice that Safeway is one of the one hundred largest corporations in the United States. It operates retail supermarkets throughout the United States. It purchases fruits and vegetables directly from growers or growers' associations. Presently about 81% of the lettuce purchased by Safeway is purchased from growers who recognize the Teamsters as bargaining agent, about 9% is purchased from growers who have recognized the Union and the remaining 10% is purchased from growers who do not recognize either union.

As means of forcing growers of grapes and lettuce to recognize it as bargaining agent for agricultural employees the Union has organized a campaign to persuade the public to buy only grapes and lettuce produced by growers who have contracts with it and to

boycott grapes and lettuce produced by growers who do not have contracts with it. It has also organized a nationwide campaign to induce the buying public to refuse to patronize Safeway so long as it sells grapes and lettuce produced by growers who do not recoqnize the Union as bargaining agent for their agricultural employees.

On May 15, 1973, while Safeway was having the grand opening of a new store at 4711 East Grant Road in Tucson, a number of the Union's representatives appeared and picketed in the traditional sense by patrolling in front of the store with placards bearing language such as "Don't Buy Safeway," "Safeway Oppresses Farm Workers," and "Safeway Hates Farm Workers." A handbill urging persons to "boycott non-union and teamster table grapes — head lettuce" was also distributed. At one time there were as many as thirteen persons picketing. Since that time, there never have been so many Union representatives at the premises of any Safeway store. The number has varied from two to seven persons.

During the first week at the Grant Road store, the Union's activities were confined to patrolling with placards and distributing handbills. Union representatives then commenced going into the parking lot to talk directly to potential customers. Their tactic was to attempt to talk to potential customers before they got out of their vehicles, hoping to persuade them not to patronize Safeway while it was easier for them to leave the premises.

The Union extended its activities to three other stores in Tucson, one in Phoenix and one in Tempe. However, at these latter five stores there has been no patrolling with placards — only distribution of handbills and vocal urging of potential customers not to patronize Safeway.

A number of handbills have been used. One is a reprint of an article in *Newsweek* regarding the dispute by the Union on one side and grape and lettuce growers and Teamsters on the other. Handprinted on the reprint are "Workers say NO on Safeway" and "Safeway Sells Teamster Lettuce." This handbill could be interpreted as urging the public not to patronize Safeway.

None of the other handbills can be so interpreted. In one way or another they urge the public to buy only grapes and lettuce bearing the Union's label and to boycott "scab", "Non UFW Union" or "non-union lettuce and grapes." One handbill informs the public that the Union has asked Safeway to "buy only United Farm Workers lettuce and grapes," and urges a boycott of such products. Nothing in the handbill suggests a boycott of Safeway.

However, the Union freely acknowledges that it is organizing a nationwide campaign to urge the public not to patronize Safeway so long as it purchases grapes and lettuce from growers who do not have contracts with the Union. Representatives of the Union have called on Safeway's vice president for the Arizona division and its district manager in Tucson to inform them

that the Union proposed to force Safeway to bring economic pressure on growers to compel them to bargain with the Union.

The Union eschews violence. Its representatives are urged to avoid provocative conduct which will turn members of the public against them. Their activities have not been accompanied by any vile, abusive or threatening language, by attempts to hinder or obstruct persons from entering Safeway stores or by any other coercive or intimidating conduct.

Five of the six stores in question are in shopping centers in which there are also other stores and in which Safeway is a lessee. There was no evidence that the activities of the Union on these premises were without license from the lessors. The sixth store, at 1983 East Broadway in Tucson, is a so-called "free standing" store. Safeway is the owner of the premises and it is the only occupant of the premises. At that store, representatives of the United Farm Workers have been requested not to engage in their activities on the premises but to confine themselves to the public sidewalks abutting the premises.

THE CONTENTIONS OF THE PARTIES

Safeway contends that the activities of the representatives of the United Farm Workers Union constitute picketing in furtherance of a secondary boycott in violation of A.R.S. 23-1323; unfair labor practices in violation of A.R.S. 23-1385B; acts of trespass; and a combination in restraint of trade in violation of A.R.S. 44-1401.

The Union concedes that the carrying of placards or signs in front of a Safeway store would be picketing which could be restrained. However, it contends that the distribution of handbills and the talking to potential customers of Safeway are free speech activities which are protected from injunction by constitutional guarantees of free speech.

LEGAL CONCLUSIONS

1. Secondary Boycott

At the conclusion of the hearing on Safeway's petition for injunction, the Court remarked from the bench that it did not think that the activities of the Union's representatives constituted a secondary boycott as the term is defined by A.R.S. 23-1321 and which is outlawed by A.R.S. 23-1323. One of the acts prohibited in furtherance of a secondary boycott is picketing and the court did not feel at the time that picketing extended to the distribution of handbills or to talking to potential customers. The opinion expressed by the Court was erroneous. The term "picketing" embraces more than mere patrolling with placards. Picketing is defined at 48 Am. Jur. 2d, Labor Relations, Sec. 1382, p. 860 as:

> "... walking or patrolling in the vicinity of a place of business involved in a labor dispute and, by word of mouth, banner or placard, undertaking to inform the public concerning the dispute ... picketing may be intended to persuade workers to quit their jobs or not to seek employment, or to advise members of the public of the labor dispute and influence them to withhold their patronage."

A number of courts have held that the distribution of handbills constitutes picketing. *Roywood Corporation v. Radio Broadcast Technicians Local U. Number 1264,* 290 Fed. Supp. 1008 (SD Ala., 1968), *Potter v. Plubers and Pipefitters Local Union Number 142,* 192 Fed. Supp. 641 (WD Tex., 1960), *Jones v. State,* 18 S.E. 2d 844 (Ga., 1942)

The defendants argue that the Supreme Court of the United States made a distinction between "picketing" and "handbilling" in *NLRB v. Fruit and Vegetable Packers Warehousemen,* 377 U.S. 58, 12 Law Ed. 2d 128, 84 Sup. Ct. 1063. However, that case simply involved the construction of Section 8(b)(4) of the National Labor Relations Act, which differentiates between "picketing" and "publicity." The Supreme court did not hold that handbilling had a constitutionally more favored status than carrying placards.

Prohibiting picketing to enforce a secondary boycott, an activity declared illegal by the state, is not an unconstitutional impairment of freedom of speech. See *Baldwin v. Arizona Flame Restaurant,* 82 Ariz. 385, 313 P. 2d 759 (1957)

The Court concludes that the defendant Union is guilty of engaging in a secondary boycott by picketing, which includes not only patrolling with placards but also distributing handbills and vocally urging persons not to patronize Safeway.

2. Unfair Labor Practices

A.R.S. Sec. 23-1385B of the Agricultural Employment Relations Act makes certain activities of a labor organization or its agents unfair labor practices. Safeway contends that the defendants have been guilty of a number of these unfair labor practices.

Subsection 7 makes it an unfair labor practice

> "To induce or encourage or threaten, restrain or coerce any secondary employer or any executive or management employee of any secondary employer to make a management decision not to handle . . . sell or distribute any agricultural commodity of an agricultural employer with whom a labor dispute exists."

This provision is plainly unconstitutional. Any public statement by the Union of its dispute with the growers could conceivably induce or encourage Safeway not to sell the growers' products. Enforcement of Subsection 7 would serve to completely muzzle the Union.

In holding similar language to be unconstitutional, the California Supreme Court stated the applicable rule in *Ex Parte Blaney*, 184 P. 2d 893, 897 (1947):

> ". . . Under that provision should a group of employees or a union merely agree to give publicity to their disputes with their employers by radio or newspaper, if that agreement and publicity results in persuading the employees of some other employer to withhold services from their employer an injunction will ie. (sic) In other words their freedom to publicize their labor disputes or even to agree to do so is penalized . . . The inducement or persuasion to refrain from dealing may be accomplished merely by advising the dealer of the controversy and requesting him to refrain from

> dealing, a matter beyond doubt within the realm of the right of free speech. Merely because the object, the intermediate object (the main objective being to correct a grievance against the employer with whom the dispute exists), is to induce third persons (the dealers) to assist in exerting the economic pressure does not create an unlawful aim. Nor is the communication of the facts of the existence of the dispute to them (the dealers) and persuading them to withhold their business, an unlawful means of furthering the campaign against the employer with whom the controversy exists. A statute so broadly and loosely drawn — which places it within the power of the court to grant injunctive relief which by its terms my be used to strike down the right to freedom of speech — is a prior restraint upon that right. . . ."

That the Arizona Legislature did not intend that Subsection 7 would have such a sweeping effect is indicated by the language of A.R.S. 23-1325C:

> "The expressing of any views, argument, opinion or the making of any statement, including expressions intended to influence the outcome of an organizing campaign (or) a bargaining controversy . . . or the dissemination of such views . . . shall not constitute or be evidence of an unfair labor practice. . . .

Subsection 7 is so vague as to what the Legislature intended to be an unfair labor practice that it must be held to be unconstitutional.

It should be emphasized that the Court's conclusion that Subsection 7 is unconstitutional does not invalidate the other sections of the act.

Safeway contends that the Union is also in violation of Subsection 8 of A.R.S. 23-1385B because its publicity regarding its dispute with growers does not specifically name the agricultural employers with whom the labor union has a primary dispute. The Union publicity has urged the public to purchase only grapes and lettuce bearing the union seal or has urged the public not to buy lettuce and grapes produced by growers who do not have contracts with the Union. The Court concludes that the Union's publicity is a sufficient compliance with Subsection 8.

Subsection 9 makes it an unfair labor practice to "restrain, coerce or threaten an ultimate consumer to prevent him from purchasing, consuming or using such agricultural products." The Court concludes that none of the activities of the Union fall within the meaning of the terms "restrain, coerce or threaten."

Subsection 12 makes it an unfair labor practice to boycott

> "Any agricultural employer when the objective is to induce, encourage, force or require an agricultural employer to recognize or bargain with the labor organization . . . unless such labor organization is currently certified as a representative of such employees . . . where the agricultural employer has lawfully recognized in accordance with this article any other labor organizations. . . ."

There was no evidence presented that the growers had lawfully recognized the Teamsters in accordance with the provisions of the Agricultural Employment Relations Act.

Subsection 6 makes it an unfair labor practice to engage in a secondary boycott as defined in A.R.S. Section 23-1321. The Court has already concluded that the defendants have been guilty of engaging in a secondary boycott. It further concludes that they have not unlawfully engaged in any other unfair labor practice set forth in A.R.S. 23-1385B.

3. Trespasses

Safeway contends that the Union should be enjoined because it has been guilty of trespasses. However, in five of the six stores at which activities have taken place, Safeway was not the owner of the premises but a lessee and there were other tenants on the premises. There was no evidence that the owner of the premises had in any way objected to the activities by the Farm Workers Union. In *Amalgamated Food Employees v. Logan Valley Plaza*, 319 U.S. 308, 20 Law Ed. 2d 603 (1968), picketing to publicize a labor dispute was held not to be a trespass where it was conducted on a shopping center's premises which had taken the characteristic of a public business district. However, in *Central Hardware Co. v. NLRB*, _____ U.S. _____, 33 Law Ed. 2d 122 (1972) and *Lloyd Corporation v. Tanner*, _____ U.S. _____, 33 Law Ed. 2d 131 (1972), the Supreme Court of the United States held that there was no right to picket on private property to publicize a labor dispute. Safeway's store at 1938 East Broadway in Tucson is on property owned by Safeway and the activities of the Union's representatives on this property constitute a trespass.

4. Combination Restraint of Trade

The Court concludes that the activities of the representatives of the United Farm Workers Union are not a combination in restraint of trade within the meaning of A.R.S. 44-1401 to -1408.

ORDER FOR INJUNCTION

IT IS ORDERED that the defendant United Farm Workers Union, its officers, agents, servants, employees and representatives and all persons in active concert or participation with them are hereby, until further order of the court, restrained and enjoined as follows:

a. From conducting a secondary boycott of Safeway stores throughout Arizona by picketing within or in front of such stores, in parking lots used by Safeway's customers or in the immediate vicinity of such stores.

b. From trespassing on the premises of 1938 East Broadway, Tucson, Arizona, or any other free standing Safeway store for the purpose of picketing.

IT IS FURTHER ORDERED denying the application of Safeway stores for an injunction enjoining the defendants from picketing Safeway stores (other than free standing stores such as the store at 1938 Broadway, Tucson, Arizona) for the purpose of publicizing the Union's dispute with grape and lettuce growers and urging persons not to purchase grapes or lettuce produced by growers who do not have contracts with United Farm Workers Union.

IT IS FURTHER ORDERED denying Safeway stores application for an injunction enjoining defendants from mass picketing or from threatening or committing acts of intimidation or violence against

plaintiff's property or its officers, agents, employees or against other desiring to do business with plaintiff, there being no evidence presented to justify such an injunction.

DATED this 22nd day of June, 1973.

Judge of the Superior Court

Copies of the foregoing mailed to:
Mr. Frederick K. Steiner, Jr.
Mr. James Rutkowski

EXHIBIT 2B

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

SAFEWAY STORES, INC., a Maryland corporation, *Plaintiff,* vs. UNITED FARM WORKERS UNION, a labor organization; JOHN DOES 1 - 100, *Defendants.*	C-278338 ORDER MODIFYING MEMORANDUM AND ORDER OF JUNE 22, 1973

After hearing, and pursuant to the Court's ruling, IT IS ORDERED:

1. The motion of Plaintiff to punish for contempt and to enlarge injunction is withdrawn, by stipulation of the parties.

2. The Court's Memorandum of Opinion and Order of June 22, 1973 is modified as follows:

(a) The final paragraph of the Court's Legal Conclusion 1. is modified by changing the period at the end of the sentance to a comma and by adding the phrase "except on a one-to-one basis."

(b) The Court's Order for Injunction is modified as follows:

(i) In Paragraph "b" by changing the period to a comma and by adding the phrase "or at the premises controlled by Safeway at 827 East Main, Mesa and at 5340 West Glendale, Glendale, Arizona."

(ii) By adding the following Paragraph "c":

"c. By picketing with no more than 15 persons at any one Safeway location, no more than five of which shall be within the parking lot at any one time."

(iii) By adding the following Paragraph "d":

"d. Plaintiff's bond in this Preliminary Injunction is set at $1,000."

DONE IN OPEN COURT this 20th day of July, 1973.

_____
Judge of the Superior Court

APPROVED AS TO FORM:

_____
Frederick K. Steiner, Jr.
Attorney for Plaintiff

_____
James Rutkowski
Attorney for Defendants

EXHIBIT 2C

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

SAFEWAY STORES, INC., a Maryland corporation, *Plaintiff,* vs. UNITED FARM WORKERS UNION, a labor organization; JOHN DOES 1-100, *Defendants.*	NO. C-278338 AMENDED MEMORANDUM OPINION AND ORDER

On June 22, 1973, the court handed down its memorandum opinion and order in which it enjoined the defendants from conducting a secondary boycott of Safeway Stores by picketing within or in front of such stores, and parking lots used by Safeway's customers or in the immediate vicinity of such stores; and from trespassing on the premises of free standing Safeway Stores for the purpose of picketing. The court also denied Safeway's application for an injunction restraining the defendants from picketing Safeway Stores (other than free standing stores) for the purposes of publicizing the Union's dispute with grape and lettuce growers and urging persons not to purchase grapes or lettuce produced by growers who did

not have contracts with the Union. The court's memorandum opinion included a conclusion that the defendant Union had been guilty of engaging in a secondary boycott by picketing by patroling with placards, distributing handbills and vocally urging persons not to patronize Safeway. On July 25, 1973, in granting a motion of defendants to amend, the court added to its conclusion regarding a secondary boycott an exclusion, "except on a one to one basis".

The June 22nd memorandum opinion and order was based upon evidence which had been received by the court during a hearing of Safeway's application for a temporary injunction. Part of that evidence was that in some instances the Safeway owned the property upon which the store is located, the so-called free standing store, and in other instances it was a lessee in a shopping center in which there were other businesses leasing their premises from a common owner. The court noted (at Page 8), "There was no evidence that the owner of the premises had in any way objected to the activities by the Farm Workers Union." It now appears that with respect to many, if not all such shopping centers, Safeway is the lessee of the entire premises from the fee simple owner and Safeway subleases space to other businesses and retains control of the parking lots. It now claims that it should be entitled to treat such premises as if they were free standing and thus exclude all picketing.

The controlling principles of law are found in *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U. S. 308, 20 L. Ed. 2d 603, 88 Sup. Ct. 1601 (1968) and *Lloyd Corporation v. Tanner,* 407 U.S. 551, 33 L. Ed. 2d 131, 92 Sup. Ct. 2219 (1972). In

Logan Valley, Weis Markets was a tenant in a large shopping center in which it operated a supermarket and employed a wholly non-union staff. When the union began picketing Weis, carrying signs stating that it was a non-union market and landlord and the tenant obtained an injunction against the picketing. In overruling the state courts, the Supreme Court of the United States held that the shopping center was open to the public to the same extent as the commercial center of a normal town and that state trespass laws could not be invoked to exclude picketing.

In *Lloyd* the Supreme Court did not overrule *Logan Valley* but severely restricted its application. It was held that *Logan Valley* only upheld picketing which was directly related in its purpose to the use to which the shopping center property was being put and where the store was so located that no other reasonable opportunity for the pickets to convey their message was available. The court also held in *Lloyd* that the rights of private property owners are entitled to be respected and protected; that a trespasser or an invited guest has no general right of free speech on private property "used non-discriminatorily for private purposes only" and that one who operates a business which is open to the public and provides parking facilities does not dedicate his property to public use so as to entitle persons to exercise first amendment rights thereon.

Significantly, the court in *Lloyd* found no difference in principle between a free standing store and one located in a shopping center.

A careful reconsideration of *Lloyd* persuades the court that some of its conclusions and orders in its June 22nd memorandum opinion and order were erroneous and require correction:

1. The court concludes that the activities of the defendants in urging the public not to purchase grapes and lettuce which have been supplied to Safeway by growers who do not have contracts with the defendant union are directly related to the purpose to which the Safeway Stores property are being put. The court also finds that it would be unreasonable to require the defendants to limit their picketing to the entrances to the parking lots surrounding Safeway Stores. Passing out handbills or otherwise attempting to communicate the Union's position at such entrances would, in the court's opinion, cause real traffic hazards.

2. The court adheres to its original conclusion that approaching patrons of Safeway in its parking lots on a one to one basis and urging them not to patronize Safeway does not constitute a secondary boycott by picketing.

3. However, such activity cannot be held to be directly related in its purpose to the use to which the Safeway property is being put; it is only indirectly related thereto. Such activity is directly related in its purpose to coerce Safeway into refusing to buy non-union lettuce and grapes, an activity which does not take place at the Safeway Stores but at the place where such items are purchased by Safeway.

4. Thus the court concludes that Safeway or the fee simple owner of any property upon which a Safeway Store and its parking lots are located may prohibit the defendants from approaching persons on their property on a one to one basis for the purpose of inducing such persons not to patronize Safeway.

IT IS ORDERED setting aside the court's order of June 22, 1973, as modified.

IT IS FURTHER ORDERED that the defendant United Farm Workers Union, its officers, agents, servants, employees and representatives and all persons in active concert or participation with them are hereby, until further order of the court, restrained and enjoined as follows:

A. From conducting a secondary boycott of Safeway Stores throughout Arizona by picketing within or in front of such stores, in parking lots used by Safeway's customers or in the immediate vicinity of such stores.

B. From trespassing on premises owned or controlled by Safeway for the purpose of inducing persons not to patronize Safeway Stores.

IT IS FURTHER ORDERED denying the application of Safeway for an injunction enjoining the defendants from picketing Safeway Stores for the purpose of publicizing the defendant Union's dispute with grape and lettuce growers and urging persons not to purchase grapes or lettuce produced by growers who do not have contracts with the United Farm Workers Union.

IT IS FURTHER ORDERED limiting the number of persons who may picket at any one Safeway location to not more than fifteen (15) persons, no more than five (5) of whom may patrol within the parking lot at any one time.

IT IS FURTHER ORDERED continuing plaintiff's bond for preliminary injunction in effect in the sum of $1,000.

DATED this 11th day of October, 1973.

_____
Judge of the Superior Court

Copies of the foregoing mailed to:

Mr. Frederick K. Steiner, Jr.
Mr. James Rutkowski

EXHIBIT 2D

THE SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

SAFEWAY STORES, INC., A Maryland Corporation, *Plaintiff* v. UNITED FARM WORKERS UNION, a labor organization, DAVID KOEHLER, PATRICK BONNER, NANCY GALLEN MCKOVIAK, GERALD ROBINNETTE, ANGELA LOCKE, JOHN DOES 1-100, *Defendants*	CIV. NO. 278338 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PRELIMINARY INJUNCTION

FINDINGS OF FACT

1. The defendant United Farm Workers Union (hereinafter referred to as Union) is a labor organization which seeks to represent agricultural employees in collective bargaining with agricultural employers.

2. The defendants, David Koehler, Patrick Bonner, Nancy Gallen McKoviak, Gerald Robinnette, and Angela Locke, are agents, employees or representatives of the Union.

3. Plaintiff, Safeway Stores, Inc., a Maryland corporation, owns or controls several stores in the state of Arizona from which groceries, including lettuce and grapes, are sold to the public. (The plaintiff will hereinafter be referred to as Safeway).

4. As of June 22, 1973, lettuce and grape growers in Arizona and California have recognized the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the bargaining agent for their agricultural employees. The Union contends that such recognition is invalid because the employees were never given any choice in the matter and if elections were held on the issue the overwhelming majority of farmworkers would select the Union as their bargaining agent.

5. Safeway purchases fruits and vegetables directly from growers or growers associations. Presently about 81% of the lettuce purchased by Safeway is purchased from growers who recognize the Teamsters as bargaining Agent, about 9% is purchased from growers who recognize the Union and the remaining 10% is purchased from growers who do not recognize either union.

6. As a means of forcing growers of grapes and lettuce to recognize it as bargaining agent for agricultural employees, the Union has organized a campaign to persuade the public to buy only grapes and lettuce produced by growers who have contracts with it and to boycott grapes and lettuce produced by growers who do not have contracts with it. It has also organized a nationwide campaign to induce the public to refuse to

patronize Safeway so long as it sells grapes and lettuce produced by growers who do not recognize the Union as bargaining agent for their agricultural employees.

7. The Union has engaged in a secondary boycott by picketing, which included not only patrolling with placards but also distributing handbills and vocally, in unison, urging persons not to patronize Safeway.

8. The Union intends to conduct a secondary boycott by picketing Safeway locations.

9. On or about October 20, 1973, the Union, its agents, employees and representatives, and persons in active concert or participation with the Union, assembled at the Safeway store at 24th Street and East Van Buren in Phoenix, Arizona. During this assembly there were approximately 120 people affiliated with the Union who stood or patrolled on the public sidewalk or property not controlled by Safeway.

10. At the Safeway store at 24th Street and East Van Buren, on or about October 20, 1973, and on other occasions prior to the issuance of this Order, the Union, its agents, employees and representatives, or persons in active concert or participation with the Union, have carried placards and distributed handbills, urging the publicnot to purchase grapes or lettuce from Safeway stores. Some of the persons affiliated with the Union have carried placards and distributed handbills which made no specific reference to grapes or lettuce and some of the participants have carried a flag emblematic of the Union.

11. It is the policy of the Union to avoid violence and to seek to persuade the public by peaceful means not to purchase grapes and lettuce from Safeway. However, there is evidence in the record that the Union's policy or instructions have not always been strictly followed by persons picketing at the request of Union representatives.

12. On or about November 15, 1973, there were more than fifteen pickets on Safeway locations in Maricopa County.

13. There is unrebutted evidence in the record to the effect that occasionally customers of Safeway have had difficulty in getting out of their automobiles in Safeway parking lots because of the acts of the pickets and, in isolated instances, that threatening language has been used by the pickets towards customers of Safeway.

14. The Safeway stores in Arizona are either free standing stores or are located in shopping centers. With respect to many, if not all such shopping centers, Safeway is the lessee of the entire premises from the fee simple owner and Safeway subleases space to other businesses and retains control of the parking lots. in the vicinity of some of the Safeway stores, there are public sidewalks and other areas which are neither owned or controlled by Safeway. If the defendants try to distribute handbills or otherwise communicate with Safeway customers as these customers enter the Safeway parking lots and premises from public streets, they would create a traffic hazard.

15. The picketing of the Safeway premises by the defendants has a direct relation to the purpose for which Safeway stores and parking lots were built and are being used.

16. One-to-one communication by the defendants in Safeway parking lots has a direct relation to the purpose for which Safeway stores and parking lots were built and are being used.

17. The defendant Union would be deprived of all reasonable opportunity to convey its message to the patrons of the Safeway stores if they are denied all access to the Safeway locations.

CONCLUSIONS OF LAW

1. The plaintiff Safeway is entitled to a preliminary injunction restraining the defendants from conducting a secondary boycott at Safeway stores throughout Arizona by picketing within or in front of such stores, in Safeway parking lots adjacent to such stores, or on premises adjacent to the stores, which premises are owned or controlled by Safeway.

2. In the context of this lawsuit, secondary boycott by picketing includes using terms such as "Don't shop Safeway" or "Boycott Safeway" or other language generally urging the public not to patronize Safeway, by means of placards, signs, flags, handbills or chanting in unison by persons engaged in picketing. Secondary boycott by picketing does not include (1) urging Safeway customers not to purchase grapes or lettuce produced by growers who do not have contracts with the United Farm Workers Union or (2) communication

by individuals lawfully on Safeway premises who are engaged in one-to-one communication with customers of Safeway.

3. Safeway is entitled to a preliminary injunction against the defendants, limiting the number of persons who may enter premises owned or controlled by Safeway for the purpose of engaging in one-to-one communication with its customers.

4. The plaintiff Safeway is entitled to a preliminary injunction restraining the defendants from using any vile, abusive or threatening language towards Safeway customers or from attempts to hinder or obstruct persons from entering the Safeway premises or Safeway stores.

5. The plaintiff Safeway is not entitled to a preliminary injunction at the present time, restraining the defendants from engaging in picketing on premises near Safeway stores, which premises are neither owned nor controlled by the plaintiff Safeway.

PRELIMINARY INJUNCTION

IT IS ORDERED that the defendant, United Farm Workers Union, its officers, agents, servants, employees and representatives, including the defendants, David Koehler, Patrick Bonner, Nancy Gallen McKoviak, Gerald Robinnette and Angela Locke, and all persons in active concert or participation with them, are hereby, until further Order of the Court, restrained and enjoined as follows:

1. From conducting a secondary boycott on Safeway stores throughout Arizona by picketing within or in front of any Safeway store, in Safeway parking lots adjacent to such stores, or on premises adjacent to the

stores, which premises are owned or controlled by Safeway. This injunction does not restrain picketing by use of placards, handbills or other means of expression which specifically relate to lettuce and grapes produced by growers who do not have contracts with the United Farm Workers Union as long as such picketing shall be conducted by not more than fifteen people at any one Safeway location whose activities are reasonably regulated by the defendants, as set forth in this Order, as follows:

(a) The fifteen pickets permitted at any one Safeway location by this Order shall limit their patrolling to the sidewalks or walkways immediately adjacent to and outside the structure housing the Safeway store. At no time shall such picketing interfere with the right of anyone to enter or leave the Safeway store through any public entrance or exit; in this connection, Safeway may paint lines or otherwise clearly delineate a semi-circular area described by a radius of fifteen feet from the center of each public entrance and exit, within which delineated area no picketing shall be conducted, nor shall there be any other contact with Safeway customers within this delineated area.

(b) Five of the fifteen pickets at any one location may patrol in the parking lot of each Safeway location and may communicate on a one-to-one basis with Safeway customers.

(c) At no time shall any picket unreasonably interfere with any person's attempt to get into or out of his or her automobile in the parking lot.

(d) The placards, signs, flags or other materials being carried by the pickets on the premises of Safeway may contain words urging the public not to purchase grapes and lettuce which have been supplied to Safeway by growers who do not have contracts with the United Farm Workers Union, but the entire message shall be carried in print or type of equal size and visibility. These placards, signs and other materials shall not say "Don't shop Safeway" or "Boycott Safeway" or words to that effect, unless such words refer to grapes and lettuce and the reference to these products is in print or type of equal size and visibility as the words urging the public not to patronize Safeway.

(e) Any handbill or other literature distributed by the pickets while on Safeway premises shall not use the words "Don't shop Safeway" or "Boycott Safeway" or the equivalent words, unless in close conjunction with the use of those words there is a reference in the same handbill or literature to grapes and lettuce, and such reference shall be of equal type, size and visibility as the words "Boycott Safeway" or "Don't shop Safeway" or the equivalent words.

(f) The automobiles or other vehicles of the fifteen persons engaged in the picketing and any other person at the Safeway location at the request of the defendants, shall not be parked in the Safeway parking lots.

2. From interferring with the movement into and out of Safeway premises by any person or persons by means of picketing, patrolling or demonstrating on public property, or property controlled by persons

other than Safeway, which properties are adjacent to Safeway locations.

3. From entering or coming upon the Safeway premises or premises owned or controlled by Safeway, except that fifteen persons may enter or come upon the premises for the purpose of engaging in the picketing permitted by this Preliminary Injunction, and five of those fifteen persons may patrol in the Safeway parking lots in order to engage in one-to-one communication with Safeway customers.

4. From using any vile, abusive or threatening language towards Safeway customers or attempting to hinder or obstruct persons from entering the Safeway premises or Safeway stores from anywhere, including public streets, public sidewalks or other areas adjacent to the Safeway location.

5. From blocking or otherwise interferring with plaintiff's use of any entrances to its stores, which entrances are used primarily for employees or making deliveries.

6. The bond in the sum of $1,000.000 previously deposited by the Plaintiff with the Clerk of this Court, shall be the security for this Preliminary Injunction. The bond shall be for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

It is the intention of the Court to obtain a Spanish translation of this Preliminary Injunction. This translation will be sent to counsel for the defendants. Upon its receipt the defendants shall deliver a copy of this Preliminary Injunction in English and in Spanish to

everyone in active concert or participation with them in the picketing or in other demonstrations at the Safeway locations.

DATED this 13th day of December, 1973.

Jeremy E. Butler
Judge Pro tem of the Superior Court

EXHIBIT 2E

IN THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA

SAFEWAY STORES, INC., a Maryland corporation, *Plaintiff,* v. UNITED FARM WORKERS UNION, a Labor organization, et. al. *Defendants.*	CIV - 278338 STIPULATION AND ORDER GRANTING PERMANENT INJUNCTION

Plaintiff and defendants, through their undersigned counsel, hereby stipulate and agree that the preliminary injunction issued by this Court in its Findings of

Fact, Conclusions of Law, and Preliminary Injunction dated December 13, 1973, be made permanent and binding upon the parties to this action.

DATED this 25th day of February, 1974.

SNELL & WILMER
Frederick K. Steiner, Jr.
3100 Valley Center
Phoenix, AZ 85073
Attorneys for Plaintiff

Bruce Meyerson
P. O. Box 1621
Phoenix, AZ 85001
Attorney for Defendants

ORDER GRANTING PERMANENT INJUNCTION

Upon consideration of the Stipulation submitted jointly by the plaintiff and the defendants in the above-captioned matter, and it appearing to the Court that:

Plaintiff commenced this action against defendants praying for an injunction requiring them to refrain from certain actions enumerated in plaintiff's Complaint, and

Full hearings were held upon the pleadings and motions of the parties, pursuant to which the Court issued a series of Orders granting and modifying permanent injunctions, the last such Order being issued December 13, 1973, and

Plaintiff has deposited satisfactory bond with the Court,

IT IS ORDERED that the defendant, United Farm Workers Union, its officers, agents, servants, employees and representatives, including the defendants, David Koehler, Patrick Bonner, Nancy Gallen

McKoviak, Gerald Robinnette and Angela Locke, and all persons in active concert or participation with them, are hereby, until further Order of the Court, restrained and enjoined as follows:

1. From conducting a secondary boycott on Safeway stores throughout Arizona by picketing within or in front of any Safeway store, in Safeway parking lots adjacent to such stores, or on premises adjacent to the stores, which premises are owned or controlled by Safeway. This injunction does not restrain picketing by use of placards, handbills or other means of expression which specifically relate to lettuce and grapes produced by growers who do not have contracts with the United Farm Workers Union as long as such picketing shall be conducted by not more than fifteen people at any one Safeway location whose activities are reasonably regulated by the defendants, as set forth in this Order, as follows:

(a) The fifteen pickets permitted at any one Safeway location by this Order shall limit their patrolling to the sidewalks or walkways immediately adjacent to and outside the structure housing the Safeway store. At no time shall such picketing interfere with the right of anyone to enter or leave the Safeway store through any public entrance or exit; in this connection, Safeway may paint lines or otherwise clearly delineate a semi-circular area described by a radius of fifteen feet from the center of each public entrance and exit, within which delineated area no picketing shall be conducted, nor shall there be any other contact with Safeway customers within this delineated area.

(b) Five of the fifteen pickets at any one location may patrol in the parking lot of each Safeway location and may communicate on a one-to-one basis with Safeway customers.

(c) At no time shall any picket unreasonably interfere with any person's attempt to get into or out of his or her automobile in the parking lot.

(d) The placards, signs, flags or other materials being carried by the pickets on the premises of Safeway may contain words urging the public not to purchase grapes and lettuce which have been supplied to Safeway by growers who do not have contracts with the United Farm Workers Union, but the entire message shall be carried in print or type of equal size and visability. These placards, signs, and other materials shall not say "Don't shop Safeway" or "Boycott Safeway" or words to that effect, unless such words refer to grapes and lettuce and the reference to these products is in print or type of equal size and visibility as the words urging the public not to patronize Safeway.

(e) Any handbill or other literature distributed by the pickets while on Safeway premises shall not use the words "Don't shop Safeway" or "Boycott Safeway" or the equivalent words, unless in close conjunction with the use of those words there is a reference in the same handbill or literature to grapes and lettuce, and such reference shall be of equal type, size and visibility as the words "Boycott Safeway" or "Don't shop Safeway" or the equivalent words.

(f) The automobiles or other vehicles of the fifteen persons engaged in the picketing and any other person at the Safeway location at the request of the defendants, shall not be parked in the Safeway parking lots.

2. From interferring with the movement into and out of Safeway premises by any person or persons by means of picketing, patrolling or demonstrating on public property, or property controlled by persons other than Safeway, which properties are adjacent to Safeway locations.

3. From entering or coming upon the Safeway premises or premises owned or controlled by Safeway, except that fifteen persons may enter or come upon the premises for the purpose of engaging in the picketing permitted by this Permanent Injunction, and five of those fifteen persons may patrol in the Safeway parking lots in order to engage in one-to-one communication with Safeway customers.

4. From using any vile, abusive or threatening language towards Safeway customers or attempting to hinder or obstruct persons from entering the Safeway premises or Safeway stores from anywhere, including public streets, public sidewalks or other areas adjacent to the Safeway locations.

5. From blocking or otherwise interferring with plaintiff's use of any entrances to its stores, which entrances are used primarily for employees or making deliveries.

6. The bond in the sum of $1,000,000 previously deposited by the Plaintiff with the Clerk of this Court, shall be the security for this Permanent Injunction. The bond shall be for the payment of such costs and

damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

7. The Findings of Fact and Conclusions of Law rendered by this Court dated June 22, 1973 and December 12 and 13, 1973 are incorporated herein by this reference, and the law governing the terms of this Permanent Injunction is declared to be set forth in the above Conclusions of Law insofar as those Conclusions have not been modified by any subsequent orders of this Court.

DONE IN OPEN COURT this 27th day of February, 1974.

_____

Judge of the Superior Court

EXHIBIT 4

[Letterhead of Jennings, Strouss & Salmon]

November 20, 1974

Agricultural Employment Relations Board
1645 West Jefferson, 4th Floor
Phoenix, Arizona 85007

ATTENTION: Mr. Robert Dickelman,
General Counsel

Re: Petitions for Recognition

Dear Mr. Dickelman:

This is to formally advise you that this firm represents the following employers, all of whom are the subject of petitions filed by the International Brother-

hood of Teamsters, Chauffeurs & Warehousemen of America, Local 274: Cook Produce, Inc., Bodine Produce Company, EverKrisp Vegetables Inc., and Tanita Farms.

This is also in formal response to the petitions. On behalf of Bodine Produce Company, EverKrisp Vegetables Inc. and Tanita Farms, the undersigned avows that said companies employ no field laborers in the lettuce harvest currently underway; that they do not pay the wages of any such employees for work performed for their benefit; and that they do not know the names of the persons who are involved in said harvest; but that the harvest of lettuce is accomplished by a contract with an independent labor contractor. In the case of each employer, the terms of the contract call for the payment of a fixed sum to the contractor for the performance of the ultimate work, and the manner and method of performing that work is not controlled by the employer. There is no employer-employee relationship between Bodine Produce Company, EverKrisp Vegetables, Inc. and Tanita Farms and the persons employed by their independent labor contractors.

As to Cook Produce, Inc., pursuant to A.R.S. § 23-1389 F, Cook Produce, Inc. hereby challenges the petition, *inter alia*, on the grounds that the authorization for the filing of such petition is not current and that such authorization has been obtained by fraud, misrepresentation or coercion.

Furthermore, it is noted that the petitions are not dated, that the employer was not, as alleged, contacted for a request for recognition and that the designation of bargaining unit involved is incorrect.

Respectfully,

JENNINGS, STROUSS & SALMON

By_____
Jon L. Kyl

[Letterhead of Jennings, Strouss & Salmon]

December 17, 1974

Robert Dickelman
General Counsel
Agricultural Labor Relations Board
1645 West Jefferson, 4th Floor
Phoenix, Arizona 85007

Re: Teamster Labor Petitions

Dear Bob:

This letter is to confirm our telephone conversation this morning and to summarize the final status of the petitions filed by the Teamsters Union, and in one case by the grower, for organization of agricultural field laborers.

First, please consider this as a formal request for withdrawal of the petitions filed by J. A. Wood Company. Second, this will confirm that all pending petitions against the other growers (except for Cook Produce, for which the Board has certified the results

of the election held) have been withdrawn by the Teamsters Union and that the Board has acknowledged the withdrawal. As I understand it, therefore, since no other petitions were accepted by the Board, the following petitions are now considered withdrawn.

J. A. Wood petition
Teamsters petition for Bodine Produce
Teamsters petition for Tanita Farms
Teamsters petition for EverKrisp Vegetables
Teamsters petition for Cactus Distributing

Finally, you know that we intended to appeal the decision of the Board relating to the definition of "employer" and "independent contractor" on behalf of Bodine Produce, Tanita Farms and EverKrisp. However, the withdrawal of the petitions against Bodine Produce and EverKrisp, and the Board's ruling that there was an insufficient showing with respect to Tanita Farms, rendered the question moot, and an appeal would, therefore, have been futile. As counsel for the Vegetable Growers Association and these individual growers, I do want to state for the record that the Board's decision was incorrect and, in view of the fact that we had no opportunity to obtain a reversal of the opinion by virtue of the mootness of the question, we believe that is has no precedential value.

On behalf of the Association, I also wish to express our appreciation for the manner in which you conducted the various meetings and hearings under very difficult circumstances.

Very truly yours,

JENNINGS, STROUSS & SALMON

By_____
Jon L. Kyl

cc: Paul Hunter
Jack McManus
Ralph Bodine
Jim Dorsey
Tom Tanita
Scott Wilkinson
Bill Cook

BEFORE THE
AGRICULTURAL EMPLOYMENT RELATIONS BOARD

DECISION

TANITA FARMS (CE 1-74),
EVERKRISP VEGETABLES, INC. (CE 2-74), and
BODINE PRODUCE COMPANY (CE 4-74),
Employers

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 274, Petitioner

CASE HISTORY:

On November 12, 1974, the Petitioners filed four petitions with this Board alleging that 30% or more of the employees at Tanita Farms, EverKrisp Vegetables, Inc., Bodine Produce Company and Cook Produce, Inc., had signed Petitioner's authorization cards, and requested that this Board conduct certification elections.

The Petitioner and Cook Produce, Inc., signed a consent election agreement on November 20, 1974. Tanita Farms, EverKrisp Vegetables, Inc., and Bodine Produce Company, however, contended that they employed no employees in the harvest of lettuce, and asked that the Petitions against them be dismissed.

A formal hearing on the matter was held in Phoenix, Arizona on November 25, 1974, before a Hearing Officer of this Board. Both parties were represented by counsel and the issues were full argued. The cases, by stipulation of the parties, were consolidated for the purpose of this hearing.

FINDINGS OF FACT:

Section 23-1382(1) defines an "Agricultural Employee, Temporary" and states in the portion pertinent to this decision:

> "If otherwise qualified, a person shall be considered an agricultural employee if an agricultural employer pays the wages of the employee for work performed for the employer's benefit or on his behalf, even though the supervision of the em-

ployee, the bookkeeping, and the issuance of payroll checks is by a person other than the employer."

Section 23-1382(2) defines an "Agricultural Employer" and states:

"..., and includes any person who provides labor and services on one or more farms as an independent contractor ..."

In the case of all three growers here, contractors are used to supply the lettuce harvest crews. The contractors are paid a given amount per carton of lettuce delivered to the pre-cooling facilities. Bodine Produce Company operates its own cooler facility and an employee of Bodine inspects the lettuce on delivery for size, condition and shape. Tanita Farms and EverKrisp Vegetables, both use a commercial cooling facility. An employee of Tanita Farms inspects the lettuce for quality, while EverKrisp Vegetables depends upon the prospective buyers to perform that function.

In all three cases, the contractor sets the wage rates of the harvest crews, supplies the necessary tools, keeps the records, and hires the members of the harvest crews.

If the grower is not satisfied with the quality of the lettuce being harvested, an executive or employee of the grower relays that dissatisfaction to the contractor or one of his foremen.

REASONING AND CONCLUSIONS:

We are called upon to interpret Sections 23-1382(1) and (2) of the Act, and to apply those Sections to the facts as brought out in the hearing.

We believe, and so find, that the overall intent of the Act is to regulate conduct between the growers, the workers, and the labor organizations in the field of agricultural, in order to achieve the declared policy of the Act as contained in Section 23-1381. To accomplish this purpose it is necessary to provide a direct link between the three parties.

We, therefore, find that in the cases presented here, the labor contractors are, in effect, supervisors of the growers and, as such, not the employers of the harvest crews. We reach this decision on the basis of our belief that through the ultimate control of the quality of the product harvested and by direct contacts with the foremen in the fields, the growers exercise day-to-day control of the workers, their performances, and the quality of their work.

DECISION:

We find the Petitions filed with regard to Tanita Farms, Inc., EverKrisp Vegetables, Inc., and Bodine Produce Company, Inc., have identified the correct employers, and direct that a hearing be held on Thursday, December 5, 1974, at 9:00 a.m. in Room 212, 1645 W. Jefferson, Phoenix, Arizona, for the purpose of resolving any remaining issues.

Dr. William S. Boice, Vice-Chariman
Gene Blake, Member
John Consaul, Member
E. N. Holgate, Member
Jack McManus, Member
Jack Montgomery, Member

[Letterhead of Agricultural Employment Relations Board]

December 6, 1974

International Brotherhood of
Teamsters, Local 274
1450 S. 27th Avenue
Phoenix, Arizona 85009

Re: Tanita Farms
Case No. CE-74

ATTN: MR. JOHN BLAKE

Dear Mr. Blake:

The union's showing of interest being inadequate to meet the required 30% under the provisions of Section 23-1389 (C) (1) A.R.S., your petition for a representation election at Tanita Farms is hereby dismissed.

Sincerely,

Robert E. Dickelman
General Counsel

[Letterhead of Agricultural Employment Relations Board]

SUBPOENA

In the matter of:

EverKrisp Vegetables, Inc., Case No. CE 2-74

TO: Joe Rodriguez
5610 West Maryland
Glendale, Arizona

Pursuant to Section 23-1391, Arizona Revised Statutes, you are hereby ordered to appear and testify under oath in the above matter before a Hearing Officer of this Board at the hour of 9:00 a.m., on the 5th day of December 1974, in Room 212, 1645 West Jefferson, Phoenix, Arizona, and there and then to produce for inspection by the Hearing Officer the following described records and documents, to wit:

Payroll records for those employees employed in the harvest of lettuce at EverKrisp Vegetables, Inc., Tolleson, Arizona, for the period ending November 12, 1974; and cancelled payroll checks, one per employee, for those persons indicated as being employed by EverKrisp Vegetable, Inc., as of November 12, 1974.

Failure to obey this Subpoena may result in enforcement in accordance with Section 23-1391(B), Arizona Revised Statutes. Signed and dated at Phoenix, Arizona, this 3rd day of December, 1974.

Robert Dickelman
General Counsel

STATE OF ARIZONA
AGRICULTURAL EMPLOYMENT
RELATIONS BOARD

Cook Produce Company, *Employer* International Brotherhood of Teamsters, Local 274, *Petitioner*	TYPE OF ELECTION (Check one) X Consent Agreement __ Board Direction Case No. CE 3-74

CERTIFICATION OF RESULTS OF ELECTION

An election having been conducted in the above matter under the supervision of the Agricultural Employment Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that no collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election within the time provided therefor;

Pursuant to authority vested in the undersigned by the Agricultural Employment Relations Board,

INSTRUCTIONS: Submit an original and four (4) copies of this Petition to ARRB. If more space is required for any one item, attach additional sheets, numbering item accordingly.

Case No. CE 4-74

Date Filed November 12, 1974

The Petitioner alleges that the following circumstances exist and requests that the Agricultural Employment Relations Board proceed under its proper authority.

1. Name of Employer	Employer Representative to Contact	Phone No.
Bodine Produce Company		277-2634

2. Address(es) of Establishment(s) Involved (Street, number, city, State and ZIP code)

Grand Ave & El Hambra - P O Box 11366 - Phoenix, Arizona 85017

3. Unit Involved

Included

All Field Laborers

Excluded

Supervisors, office workers and guards as outlined in the Act

4a Number of Employees in Unit:

Present 70

Proposed (By UC/AC) _____

4b Is This Petition Supported By 30% or more of the employees in the Unit?

XX Yes _____ No

5a. X Request for recognition as Bargaining Representative was made on 11/1/74 (Month, day, year) and Employer declined recognition on or about No Reply (Month, day, year) (If no reply, so state)

5b. _____ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

6. Recognized or Certifed Bargaining Agent (If there is none, so state)

NAME	AFFILIATION
None	
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION

7. Date of Expiration of Current Contract, If Any (Show month, day, and year)

None

8a Is There Now a Strike or Picketing at the Employer's Establishment(s) Involved?

_____ Yes XX No

8b If So, Approximately How Many Employees are Participating? None

8c The Employer Has Been Picketed By or On Behalf of None (Insert Name), a Labor Organization, of _____ (Insert Address) Since _____ (Month, day, year)

Organizations or Individuals Other than Petitioner (And Other Than Those Named in Item 8) Which Have Claimed Recognition As Representatives and Other Organizations and Individuals Known to Have a Representative Interest in Any Employees in the Unit Described in Item 5 Above. (If None, So State)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is filed by Employer)

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Teamsters Local 274 - Affiliate of International Brotherhood of Teamsters, [illegible]

(Petitioner and Affiliation, if any)

John T. B[illegible] [illegible] Secretary-Treasurer

(Signature of Representative [illegible]) (Title, if any)

INSTRUCTIONS: Submit an original and four (4) copies of this Petition to AERB. If more space is required for any one item, attach additional sheets, numbering item accordingly.	Case No. CE 1-74 Date Filed November 12, 1974 RD

The Petitioner alleges that the following circumstances exist and requests that the Agricultural Employment Relations Board proceed under its proper authority.

1. Name of Employer	Employer Representative to Contact	Phone No.
TANITA FARMS		937-9721

2. Address(es) of Establishment(s) Involved (Street, number, city, State and ZIP code)

5330 W Lamar Rd - Glendale, Arizona 85301 (P.O. Box 815)

3. Unit Involved

Included

All Field Laborers

Excluded

Supervisors, office workers and guards as outlined in the Act

4a. Number of Employees in Unit:

Present 40

Proposed (By UC/AC) _____

4b. Is This Petition Supported by 30% or more of the employees in the Unit?

X Yes _____ No

5a. x Request for recognition as Bargaining Representative was made on Nov [illegible] (Month, day, year) and Employer declined recognition on or about No Reply (Month, day, year) (If no reply, so state)

5b. _____ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

6. Recognized or Certifed Bargaining Agent (If there is none, so state)

NAME	AFFILIATION
None	
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION

7. Date of Expiration of Current Contract, If Any (Show month, day, and year)

None

8a. Is There Now a Strike or Picketing at the Employer's Establishment(s) Involved?

_____ Yes XX No

8b. If So, Approximately How Many Employees are Participating? None

8c. The Employer has Been Picketed By or On Behalf of None (Insert Name), a Labor Organization, of _____ (Insert Address) Since _____ (Month, day, year)

9. Organizations or Individuals Other than Petitioner (And Other Than Those Named in Item 8) Which Have Claimed Recognition As Representatives and Other Organizations and Individuals Known to Have a Representative Interest in Any Employees in the Unit Described in Item 5 Above. (If None, So State)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is filed by Employer)

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Teamsters Local 274 Affiliate of International Brotherhood of Teamsters, Chauffeurs & Warehousemen of America

(Petitioner and Affiliation, if any)

By John T. B[illegible]

(Signature of Representative of Person Filing petition)

Secretary-Treasurer

(Title, if any)

[illegible] 274

INSTRUCTIONS: Submit an orig. 1 and four (4) copies of this Petition to ALRB. If more space is required for any one item, attach additional sheets, numbering item accordingly.

Case No.
CE 2-74

Date Filed
November 12, 1974 RD

The Petitioner alleges that the following circumstances exist and requests that the Agricultural Employment Relations Board proceed under its proper authority.

1. Name of Employer
EverFresh Vegetables Inc.

Employer Representative to Contact

Phone No.
[illegible]

2. Address(es) of Establishment(s) Involved (Street, number, city, State and ZIP code)
6409 W Parrison - Tolleson, Arizona

3. Unit Involved

Included
All Field Laborers

Excluded
Supervisors, office workers and guards as outlined in the Act

4a. Number of Employees in Unit:
Present 56
Proposed (By UC/AC) _____

4b. Is This Petition Supported By 30% or more of the employees in the Unit?
XX Yes _____ No

5a. XX Request for recognition as Bargaining Representative was made on 11/7/74 (Month, day, year) and Employer declined recognition on or about No Reply (Month, day, year) (If no reply, so state)

5b. _____ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

6. Recognized or Certified Bargaining Agent (If there is none, so state)

NAME: None
AFFILIATION:
ADDRESS:
DATE OF RECOGNITION OR CERTIFICATION:

7. Date of Expiration of Current Contract, If Any (Show month, day, and year)

8a. Is There Now a Strike or Picketing at the Employer's Establishment(s) Involved?
_____ Yes XX No

8b. If So, Approximately How Many Employees are Participating? None

8c. The Employer Has Been Picketed By or On Behalf of None (Insert Name), a Labor Organization, of _____ (Insert Address) Since _____ (Month, day, year)

9. Organizations or Individuals Other than Petitioner (And Other Than Those Named in Item 8) Which Have Claimed Recognition As Representatives and Other Organizations and Individuals Known to Have a Representative Interest in Any Employees in the Unit Described in Item 5 Above. (If None, So State)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is Filed by Employer)

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Teamsters Local 274 affiliate of International Brotherhood of Teamsters, Chauffeurs & Warehousemen of America
(Petitioner and Affiliation, if any)

John A. Blair
(Signature of representative or person filing petition)

Secretary-Treasurer
(Title, if any)

IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast for any labor organization appearing on the ballot, and that no such organization is the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 23-1389 of the Agricultural Employment Relations Act.

Signed at Phoenix, Arizona

On the 6th day of December , 1974

Agricultural Employment Relations Board

STATE OF ARIZONA
AGRICULTURAL EMPLOYMENT RELATIONS BOARD

AGREEMENT FOR CONSENT ELECTION

Pursuant to a Petition duly filed, the undersigned parties hereby waive a hearing and AGREE AS FOLLOWS:

1. SECRET BALLOT - An election by secret ballot shall be held under the supervision of the said Board, among the employees of the undersigned Employer in the unit defined below, at the indicated time and place, to determine whether or not such employees desire to be represented for the purpose of collective bargaining by (one of) the undersigned labor organization(s). Said election shall be held in accordance with the Board's Rules and Regulations, and the applicable procedures and policies of the Board.

2. ELIGIBLE VOTERS - The eligible voters shall be those employees included within the Unit described below, who were employed during the payroll period indicated below, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, employees in the military services of the United States who appear in person at the polls, employees engaged in an economic strike which commenced less than three (3) months before the election date and who retained their status as such during the eligibility period and their replacements, but *excluding* any employees who have since quit or been discharged for cause and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated prior to the date of the election, and employees engaged in an economic strike which commenced more than three (3) months prior to the date of the election and who have been permanently replaced. At a date fixed, the parties, as requested will furnish to the Board, an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

3. NOTICES OF ELECTION - The Board shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and the parties, upon the request of and at a time designated by the Board, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. OBSERVERS - Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

5. TALLY OF BALLOTS - As soon after the election as feasible, the votes shall be counted and tabulated by the Board, or its agent or agents. Upon the conclusion of the counting, the Board shall furnish a Tally of Ballots to each of the parties. When appropriate, the Board shall issue to the parties a certification of representatives or of results of election, as may be indicated.

6. OBJECTIONS, CHALLENGES, REPORTS THEREON - Objections to the conduct of the election or conduct affecting the results of the election, or to a determination of representatives based on the results thereof, may be filed with the Board within 5 days after issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties at the time of filing with the Board. The Board shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Board may in its report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by them. If the challenges are determinative of the results of the election, the Board shall investigate the challenges and issue a report thereon. The method of investigation of objections and challenges, including the question whether a hearing

should be held in connection therewith, shall be determined by the Board, whose decision shall be final and binding.

7. RUN-OFF PROCEDURE - In the event more than one labor organization is signatory to this agreement, and in the event that no choice on the ballot in the election receives a majority of the valid ballots cast, the Board shall proceed in accordance with the Board's Rules and Regulations.

8. WORDING ON THE BALLOT - Where only one labor organization is signatory to this agreement, the name of the organization shall appear on the ballot and the choice shall be "Yes" or "No." In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot, or if the occasion demands, from top to bottom. *(If more than one union is to appear on the ballot, any union may have its name removed from the ballot by the approval of the Board of a timely request, in writing, to that effect.)*

First.

Second.

Third.

10. PAYROLL PERIOD FOR ELIGIBILITY - Wednesday, November 20, 1974, at 4:00 p.m.

11. DATE, HOURS, AND PLACE OF ELECTION -
Date: November 27, 1974
Hours: 1:00 P.M. to 2:00 P.M.
Place: Indian School Road at Cotton Lane

12. THE APPROPRIATE COLLECTIVE BARGAINING UNIT - All employees engaged in the harvest of lettuce including Lidders, Cutter-Packers, Waterboys, Loaders, and Windrows; but excluding supervisors, office workers and guards as defined in the Act, and all other employees not herein named.

_____ _____

By _____ _____ _____ _____
(Name and Title) (Date) (Name and Title) (Date)

Recommended:

_____ _____
(Board Agent) (Date)

Date approved _____ _____

_____ By _____ _____
Agricultural Employment Relations Board (Name and Title) (Date)

Case No. CE 3-74

EXHIBIT 5

[Letterhead of JENNINGS, STROUSS & SALMON]

December 17, 1974

Robert Dickelman
General Counsel
Agricultural Labor Relations Board
1645 West Jefferson, 4th Floor
Phoenix, Arizona 85007

Re: Teamster Labor Petitions

Dear Bob:

This letter is to confirm our telephone conversation this morning and to summarize the final status of the petitions filed by the Teamsters Union, and in one case by the grower, for organization of agricultural field laborers.

First, please consider this as a formal request for withdrawal of the petitions filed by J. A. Wood Company. Second, this will confirm that all pending petitions against the other growers (except for Cook Produce, for which the Board has certified the results of the election held) have been withdrawn by the Teamsters Union and that the Board has acknowl-

INSTRUCTIONS: Submit an original and four (4) copies of this Petition to ALRB. If more space is required for any one item, attach additional sheets, numbering item accordingly.

Case No. CE 3-74

Date Filed November 12, 1974 RD

The Petitioner alleges that the following circumstances exist and requests that the Agricultural Employment Relations Board proceed under its proper authority.

1. Name of Employer	Employer Representative to Contact	Phone No.
Cook Produce Inc.		937-9033

2. Address(es) of Establishment(s) Involved (Street, number, city, State and ZIP code)

6123 N 55th Avenue - P O Box 848 - Glendale, Arizona 85301

3. Unit Involved

Included

All Field Laborers

Excluded

Supervisors, office workers and guards as outlined in the Act

4a Number of Employees in Unit:

Present 40

Proposed (By UC/AC) _____

4b Is This Petition Supported By 30% or more of the employees in the Unit?

XX Yes _____ No

5a. XX Request for recognition as Bargaining Representative was made on 11/12/74 (Month, day, year) and Employer declined recognition on or about No reply (Month, day, year) (If no reply, so state)

5b. _____ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

6. Recognized or Certified Bargaining Agent (If there is none, so state)

NAME	AFFILIATION
None	
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION

7. Date of Expiration of Current Contract, If Any (Show month, day, and year)
None

8a Is There Now a Strike or Picketing at the Employer's Establishment(s) Involved?
Yes XX No

8b If So, Approximately How Many Employees are Participating? None

8c. The Employer Has Been Picketed By or On Behalf of None (Insert Name), a Labor Organization, of _____ (Insert Address) Since _____ (Month, day, year)

9. Organizations or Individuals Other than Petitioner (And Other Than Those Named in Item 8) Which Have Claimed Recognition As Representatives and Other Organizations and Individuals Known to Have a Representative Interest in Any Employees in the Unit Described in Item 5 Above. (If None, So State)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is filed by Employer)

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Teamsters Local 274 affiliate of International Brotherhood of Teamsters, Chauffeurs, & Warehousemen of America
(Petitioner and Affiliation, if any)

By John J. Blair Secretary-Treasurer
(Signature of Representative or person filing petition) RE LOCAL 274 (Title, if any)

edged the withdrawal. As I understand it, therefore, since no other petitions were accepted by the Board, the following petitions are now considered withdrawn.

J. A. Wood petition

Teamsters petition for Bodine Produce

Teamsters petition for Tanita Farms

Teamsters petition for EverKrisp Vegetables

Teamsters petition for Cactus Distributing

Finally, you know that we intended to appeal the decision of the Board relating to the definition of "employer" and "independent contractor" on behalf of Bodine Produce, Tanita Farms and EverKrisp. However, the withdrawal of the petitions against Bodine Produce and EverKrisp, and the Board's ruling that there was an insufficient showing with respect to Tanita Farms, rendered the question moot, and an appeal would, therefore, have been futile. As counsel for the Vegetable Growers Association and these individual growers, I do want to state for the record that the Board's decision was incorrect and, in view of the fact that we had no opportunity to obtain a reversal of the opinion by virtue of the mootness of the question, we believe that it has no precedential value.

On behalf of the Association, I also wish to express our appreciation for the manner in which you conducted the various meetings and hearings under very difficult circumstances.

Very truly yours,

JENNINGS, STROUSS & SALMON

By
John L. Kyl

cc: Paul Hunter
Jack McManus
Ralph Bodine
Jim Dorsey
Tom Tanita
Scott Wilkinson
Bill Cook

BEFORE THE
AGRICULTURAL EMPLOYMENT
RELATIONS BOARD

Decision and Direction of Election

CACTUS DISTRIBUTORS, INC., *Employer* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 274 *Petitioner*	CASE NO. CE 5-74

This Board having considered the evidence before it and having determined that the Petition in the above captioned matter is valid with regard to the showing of interest submitted by Petitioner, and there being no other issues to be decided, hereby Orders and Directs that an election shall be held among the employees of the Employer in accordance with the provisions of Section 23-1389(D), A.R.S., on the 17th day of December, 1974, at the time, place, and in the employee unit described below, or at such time and place as the Employer and Petitioner may mutually consent to. Further, pursuant to Section 23-1389(I), A.R.S., the Employer is hereby Ordered and Directed to furnish this Board a list of employees employed in the appropriate unit, as of the payroll ending November 27, 1974, on or before the 16th day of December, 1974.

Time: 11:00 a.m. to 12:30 p.m.
Place: The Employer's labor facilities at 115th Avenue and Route 80 (C.W. Englund Camp)

Appropriate Unit: All employees engaged in the harvest of lettuce including Lidders, Cutter-Packers, Waterboys, Loaders, and Windrows; but excluding supervisors, office workers and guards as defined in the Act, and all other employees not herein named.

Milton G. Sanders, Chairman
Dr. William Boice,
Vice-Chairman
E. N. Holgate, Member
Gene Blake, Member

December 4, 1974

EXHIBIT 6

[Letterhead of Jennings, Strouss & Salmon]

December 17, 1974

Robert Dickelman
General Counsel
Agriculture Labor Relations Board
1645 West Jefferson, 4th Floor
Phoenix, Arizona 85007

Re: Teamster Labor Petitions

Dear Bob:

This letter is to confirm our telephone conversation this morning and to summarize the final status of the petitions filed by the Teamsters Union, and in one case by the grower, for organization of agricultural field laborers.

First, please consider this as a formal request for withdrawal of the petitions filed by J. A. Wood Company. Second, this will confirm that all pending petitions against the other growers (except for Cook Produce, for which the Board has certified the results of the election held) have been withdrawn by the Teamsters Union and that the Board has acknowledged the withdrawal. As I understand it, therefore, since no other petitions were accepted by the Board, the following petitions are now considered withdrawn.

J. A. Wood petition

Teamsters petition for Bodine Produce

Teamsters petition for Tanita Farms

Teamsters petition for EverKrisp Vegetables

Teamsters petition for Cactus Distributing

Finally, you know that we intended to appeal the decision of the Board relating to the definition of "employer" and "independent contractor" on behalf of Bodine Produce, Tanita Farms and EverKrisp. However, the withdrawal of the petitions against Bodine Produce and EverKrisp, and the Board's ruling that there was an insufficient showing with respect to Tanita Farms, rendered the question moot, and an appeal would, therefore, have been futile. As counsel for the Vegetable Growers Association and these individual growers, I do want to state for the record that the

Board's decision was incorrect and, in view of the fact that we had no opportunity to obtain a reversal of the opinion by virtue of the mootness of the question, we believe that it has no precedential value.

On behalf of the Association, I also wish to express our appreciation for the manner in which you conducted the various meetings and hearings under very difficult circumstances.

Very truly yours,

JENNINGS, STROUSS & SALMON

By
Jon L. Kyl

cc: Paul Hunter
Jack McManus
Ralph Bodine
Jim Dorsey
Tom Tanita
Scott Wilkinson
Bill Cook

[Letterhead of Agricultural Employment Relations Board]

NOTICE OF HEARING

You are hereby notified that pursuant to Section R4-219 of the Rules and Regulations of the Agricultural Employment Relations Board, a hearing will be held on the Petitions (attached) of the J. A. Wood Co. (Case Nos. ERP 1-74 and ERP 2-74) on Wednesday,

INSTRUCTIONS: Submit an original and four (4) copies of this Petition to ALRB. If more space is required for any one item, attach additional sheets, numbering item accordingly.

Case No. CE 5-74

Date Filed November 22, 1974

The Petitioner alleges that the following circumstances exist and requests that the Agricultural Employment Relations Board proceed under its proper authority.

1. Name of Employer	Employer Representative to Contact	Phone No.
CACTUS DISTRIBUTORS INC.	Frank Cannata	931-5301

2. Address(es) of Establishment(s) Involved (Street, number, city, State and ZIP code)

5610 W Maryland - Glendale, Az. 85311 P O Box 848

3. Unit Involved

Included

All employees employed in lettuce harvest

Excluded

Supervisors, guards, office clerical as defined in the Act

4a Number of Employees in Unit:

Present 70

Proposed (By UC/AC) _____

4b Is This Petition Supported By 30% or more of the employees in the Unit?

xx Yes _____ No

5a. xx Request for recognition as Bargaining Representative was made on 11/22/74 (Month, day, year) and Employer declined recognition on or about No reply (Month, day, year) (If no reply, so state)

5b. _____ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

6. Recognized or Certified Bargaining Agent (If there is none, so state)

NAME _____ AFFILIATION _____

ADDRESS _____ DATE OF RECOGNITION OR CERTIFICATION

7. Date of Expiration of Current Contract, If Any (Show month, day, and year)

None

8a Is There Now a Strike or Picketing at the Employer's Establishment(s) Involved?

Yes xx No

8b If So, Approximately How Many Employees are Participating?

8c The Employer has been Picketed By or On Behalf of _____ (Insert Name), a labor Organization, of _____ (Insert Address) Since _____ (Month, day, year)

9. Organizations or Individuals Other than Petitioner (And Other Than Those Named in Item 8) Which Have Claimed Recognition As Representatives and Other Organizations and Individuals Known to Have a Representative Interest in Any Employees in the Unit Described in Item 5 Above. (If None, So State)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is filed by Employer)
None			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Teamsters Local 274 affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

(Petitioner and Affiliation, if any)

(Signature of Representative or person filing charge)

Secretary-Treasurer

(Title, if any)

December 11, 1974, at 9:00 a.m. in Room 212, 1645 West Jefferson, Phoenix, Arizona, before a Hearing Officer of this Board.

Be advised that the parties must be prepared to present evidence and arguments on all issues they wish to raise relative to these petitions.

Robert E. Dickelman
General Counsel

PETITION TO AGRICULTURAL EMPLOYMENT RELATIONS BOARD

J. A. Wood Co. — Vista Inc. hereby petitions the Agricultural Employment Relations Board, pursuant to A.R.S. § 23-1389 B 2 that a question of representation of certain of its employees exists and that the Sales Drivers and Helpers Local Union No. 274, 1450 South 27th Avenue, Phoenix, Arizona has claimed to represent the said employees of petitioner, and that an election must be held to determine whether such claim is valid.

The unit involved is the field labor involved in the harvest of lettuce at all Arizona locations, more specifically described as:

> All employees engaged in the harvest of lettuce including Lidders, Cutter-Packers, Waterboys, Loaders and Windrows; but excluding supervisors, office workers and guards as defined in the Act, and all other employees not herein named.

There is not now a strike, but there has been picket activity, both primary and secondary by the Union and its affiliates.

DATED this 3rd day of December, 1974.

I declare that I have read this petition and that the statements therein are true to the best of my knowledge and belief.

Jack McManus
General Manager
J. A. Wood Co.—Vista Inc.
P. O. Box 218
Tolleson, AZ 85353
Phone: 936-3345

EXHIBIT 8

[Letterhead of Rolle, Jones, Benton & Cole]

March 28, 1975

Agricultural Employment Relations Board
1645 West Jefferson, Room 435
Phoenix, Arizona 85007

Attention: Robert E. Dickelman

Re: Petition of G & S Produce Co.
Case No. ERP 1-75

Gentlemen:

Please be advised that the petitioner, G & S Produce Co., Inc., hereby petitions the above-entitled

Board to withdraw its Petition for Certification by Employer filed with your office on the 25th day of March, 1975.

Pursuant to our conversation of today's date, it is my understanding that this letter is all that is necessary to withdraw the petition. Thank you for your assistance in this matter.

Very truly yours,

ROLLE, JONES, BENTON & COLE

F. Keith Benton

NOTICE OF HEARING

You are hereby notified that pursuant to Section 23-1389, Arizona Revised Statutes, and Section R4-219, Rules and Regulations of the Agricultural Employment Relations Board, a hearing on the attached Petition for an election filed by G. & S. Produce, Inc., will be held before a Hearing Officer of this Board on Tuesday, April 1, 1975, at the hour of 10:00 a.m., at a location to be established.

You are further notified that Section 23-1385 (B)(12)(c), A.R.S., declares it to be unfair labor practice for a labor organization to continue picket activity after the filing of a petition.

Be advised that the parties must be prepared to present evidence and arguments on all issues they wish to raise relative to this petition.

Signed and dated at Phoenix, Arizona, this 25th day of March, 1975.

Robert E. Dickelman
Executive Secretary

BEFORE THE AGRICULTURAL EMPLOYMENT RELATIONS BOARD

In the Matter of the Application of G & S PRODUCE CO., INC., an Arizona corporation *Employer.*	PETITION FOR CERTIFICATION BY EMPLOYER PURSUANT TO A.R.S. 23-1389C ERP 1-75

COMES NOW G & S PRODUCE CO., INC., an Arizona corporation, whose address is P. O. Box 552, Somerton, Arizona 85350, and, for its claim before the above-entitled Board, alleges in support of this petition that G & S Produce Co., Inc., is an Arizona corporation and is engaged in farming and growing lettuce and cantaloupe crops in Yuma County, Arizona; that on or about the 26th day of January, 1975, your petitioner, G & S Produce Co., Inc., received a letter from the following labor organization: "Sales Drivers and Helpers, Local Union No. 274, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, 1450 South 27th Avenue, Phoenix, Arizona 85009." That said letter was signed

INSTRUCTIONS: Submit an ori[illegible] and four (4) copies of this Petition to ALRB. If more space is required for any one item, attach additional sheets, numbering item accordingly.

No. LAO 1-74

Date Filed DECEMBER 3, 1974

The Petitioner alleges that the following circumstances exist and requests that the Agricultural Employment Relations Board proceed under its proper authority.

1. Name of Employer	Employer Representative to Contact	Phone No.
J. A. WOOD CO.-VISTA INC.	Jack McManus	936-3345

2. Address(es) of Establishment(s) Involved (Street, number, city, State and ZIP code)

93rd Avenue & Harrison, Tolleson - P. O. Box 218, Tolleson, AZ 85353

3. Unit Involved

Included

Employees engaged in the harvest of lettuce including lidders, cutter-packers, waterboys, loaders and windrows at all Arizona locations

Excluded

Supervisors, office workers and guards as defined in the Act, and all other employees not herein named

4a. Number of Employees in Unit:

Present 249

Proposed (By UC/AC) _____

4b. Is This Petition Supported By 30% or more of the employees in the Unit?

_____Yes _____No

5a. _____Request for recognition as Bargaining Representative was made on _____ (Month, day, ye[illegible]

and Employer declined recognition on or about _____ (If no reply, (Month, day, year)

so state)

Union has contended for last several months it is the bargaining representat[illegible]

5b. _____Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

6. Recognized or Certified Bargaining Agent (If there is none, so state)

NAME	AFFILIATION
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION

7. Date of Expiration of Current Contract, If Any (Show month, day, and year)

8a. Is There Now a Strike or Picketing at the Employer's Establishment(s) Involved?

_____Yes _____No

8b. If So, Approximately How Many Employees are Participating?

8c. The Employer Has Been Picketed by or On Behalf of Local Union No. 274 (Insert Name), a Labor Organization, of 1450 South 27th Avenue, Phoenix, AZ (Insert Address) Since _____ (Month, day, year)

9. Organizations or Individuals Other than Petitioner (And Other Than Those Named in Item 8) Which Have Claimed Recognition As Representatives and Other Organizations and Individuals Known to Have a Representative Interest in Any Employees in the Unit Described in Item 5 Above. (If None, So State)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is filed by Employer)
NONE			

December 3, 1974

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

J. A. WOOD CO.-VISTA INC.
(Petitioner and Affiliation, if any)

By [signature] Jack McManus
(Signature of Representative or person filing petition)

General Manager
(Title, if any)

[illegible] P. O. Box 218, Tolleson, AZ 85353 936-3345

of this Petition to ALRB. If more space is required for any one item, attach additional sheets, numbering item accordingly.

Date Filed
DECEMBER 5, 1974

The Petitioner alleges that the following circumstances exist and requests that the Agricultural Employment Relations Board proceed under its proper authority.

1. Name of Employer	Employer Representative to Contact	Phone No.
J. A. Wood Co.-Vista Inc. P. O. Box 212, Tolleson, AZ 85353	Jack McManus	936-3345

2. Address(es) of Establishment(s) involved (Street, number, city, State and ZIP code)

Red Mountain Ranch, near Scottsdale, AZ, on the Ft. McDowell Indian Reservati

3. Unit Involved	4a. Number of Employees in Unit:
Included Employees engaged in the harvest of lettuce, including lidders, cutter-packers, waterboys, loaders and windrows at Red Mountain Ranch Excluded Supervisors, office workers and guards as defined in the Act, and all other employees not herein named	Present 198 Proposed (By UC/AC) _____ 4b Is This Petition Supported By 30% or more of the employees in the Unit? _____Yes _____No

5a. _____ Request for recognition as Bargaining Representative was made on _____ (Month, day, year) and Employer declined recognition on or about _____ (Month, day, year) (If no reply, so state)

5b. _____ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

6. Recognized or Certified Bargaining Agent (If there is none, so state)

NAME	AFFILIATION
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION

7. Date of Expiration of Current Contract, If Any (Show month, day, and year)

8a. Is There Now a Strike or Picketing at the Employer's Establishment(s) Involved?
_____Yes _____No

8b. If So, Approximately How Many Employees are Participating?

8c. The Employer Has Been Picketed By or On Behalf of Local Union No. 274 (Insert Name), a Labor Organization, of 1450 South 27th Avenue, Phoenix, AZ (Insert Address) Since _____ (Month, day, year)

9. Organizations or Individuals Other than Petitioner (And Other Than Those Named in Item 8) Which Have Claimed Recognition As Representatives and Other Organizations and Individuals Known to Have a Representative Interest in Any Employees in the Unit Described in Item 5 Above. (If None, So State)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is filed by Employer)

December 3, 19

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

J. A. Wood Co.-Vista Inc.
(Petitioner and Affiliation, if any)

By _____ Attorney
(Signature of Representative or person filing petition) Jon L. Ryl (Title, if any)

by David B. Castro, Secretary/Treasurer of Local #1973; that said letter advised that the said Teamster organization represented a majority of the field employees; that a copy of said letter is attached hereto and hereby incorporated by reference as Exhibit "A". That your petitioner does not believe that said Teamster organization nor any other labor organization represents a majority of its field employees.

That on or about the 18th day of March, 1975, your petitioner received a letter from the same Union organization whose name is set forth above relating to your petitioner's truck drivers, stitchers and and folders; that a copy of said letter is attached hereto and hereby incorporated by reference as Exhibit "B"; that your petitioner does not believe that said Teamster organization, or any other labor organization, represents the majority of its truck drivers, stitchers and folders.

That commencing on the 24th day of March, 1975, the said Teamster organization and/or its affiliates have engaged in picketing, harassing and otherwise interfering with your petitioner's farming operations in Yuma County, State of Arizona; that such conduct consists of an unfair labor practice under the present Agriculture Relations Act of the State of Arizona; that your petitioner hereby requests an immediate investigation and election pursuant to the terms of said Agriculture Relations Act and further requests an immediate determination be made by secret ballot to determine whether or not the field employees or the

truck drivers, stitchers and folder employees of your petitioner desire to belong to the above-mentioned Union or any other union.

The general nature of your petitioner (Employer's) business is growing lettuce and cantaloupes in Yuma County, Arizona.

Petitioner's description of the bargaining unit which should be applicable is all field employees of petitioner engaged in the growing and harvesting of lettuce and cantaloupes on petitioner's lands located in Yuma County, Arizona; petitioner further alleges that the number of employees engaged in said union amounts to approximately 300 persons; that the above-named Union, whose address is set forth in the exhibits attached hereto, and the persons making such claims on behalf of said Union are set forth in Exhibits "A" and "B" attached hereto and hereby incorporated by reference; that your petitioner has no contracts with any labor organization or other representatives of the employees; that your petitioner is unable to state whether or not the activity of the aforementioned Union constitutes a strike, but there is picketing and harassing such as slashing of tires and puncturing of tires, threats from the Union to employees of your petitioner now in progress, and such activity has commenced on or about the 24th day of March, 1975, and has continued to the date of this petition.

That your petitioner is currently in the process of growing approximately 700 acres of cantaloupes in Yuma Valley, Yuma County, Arizona; that your petitioner is also currently engaged in harvesting the remainder of some 2,000 acres of a lettuce crop; that both of said crops have and do involve field employees,

truck drivers, stitchers and folders.

That your petitioner is informed and believes and, therefore, alleges upon information and belief that the unfair labor practices now being conducted by the above-mentioned Union and persons will continue and requests said Board at the time of any investigation to determine the nature and extent of such unfair labor practices now being conducted against petitioner.

That your petitioner requests immediate action and relief from the above-entitled Board concerning all its field workers, truck drivers, and other agricultural employees engaged in the growing, production and harvesting of said lettuce and cantaloupe crops.

That your petitioner requests the above-entitled Board to determine that the appropriate bargaining unit, pursuant to the Agriculture Relations Act, be all of the agricultural workers, truck drivers, stitchers and employees of petitioner engaged in the production, growing and harvesting of said lettuce and cantaloupe crops.

Respectfully submitted,

G & S PRODUCE CO., INC., an
Arizona corporation

By_____
John C. Snyder, President

ROLLE, JONES, BENTON & COLE

By _____
F. Keith Benton
Attorneys for Employer

STATE OF ARIZONA }
County of Yuma } ss

JOHN C. SNYDER, being first duly sworn according to law deposes and says: That he is the President of G & S Produce Co., Inc., an Arizona corporation, and that he makes this verification for and on behalf of said corporation; that he has read the foregoing Petition and knows the contents thereof to be true, except for those allegations made upon information and belief, and as to those allegations he believes them to be true.

_____
John C. Snyder

SUBSCRIBED AND SWORN TO before me this 25th day of March, 1975.

_____
Notary Public

My Commision Expires:
May 3, 1977

[Letterhead of Sales Drivers and Helpers Local Union No. 274]

January 26, 1975

Griffin & Snyder Company
Somerton, Arizona 85300

Dear Sirs:

Our representatives have secured the signatures of a majority of your field employees on petitions demanding that the union be recognized as their collective bargaining agent.

This letter shall serve as notice of this majority status, and our desire to meet with you to discuss the future negotiation of a contract to cover these employees.

We expect that you will be in touch with our area representatives within 72 hours from the receipt of this letter.

Contact either Roy Mendoza, John Macias, Dan Oligario or Domingo Iames, at the below address or address shown on the letterhead to establish a meeting:

Teamsters Local #274
Phone: 602-627-2036
130 Main Street
P. O. Box 1004
Somerton, Arizona 85300

Sincerely yours,

David B. Castro
Secretary/Treasurer
Local 1973

"EXHIBIT A"

[Letterhead of Sales Drivers and Helpers Local Union No. 274]

March 17, 1975

G. S. Produce Company, Inc.
County 17
Somerton, Arizona 85350

Dear Sir:

On behalf of the Western Conference of Teamsters Agricultural Division and it's affiliated Local Union 274, we herewith serve notice that we represent a majority of your truck drivers, stitchers and folders and hereby demand recognition as their exclusive bargaining agent. We are willing to demonstrate our majority standing in any reasonable fashion.

This letter shall also serve as a request to meet at your earliest convenience for the purpose of negotiating the Collective Bargaining Agreement.

Please contact the under signed to establish a mutually agreeable date to commence negotiations.

Sincerely yours

JOHN T. BLAKE
Secretary-Treasurer

cc: Ralph Cotner
Rolle, Jones, Benton & Cole

"EXHIBIT B"

EXHIBIT 11A

EXHIBIT A
STATE OF ARIZONA

THE AGRICULTURAL EMPLOYMENT RELATIONS BOARD
PHOENIX, ARIZONA

UNITED FARM WORKERS OF AMERICA, AFL-CIO, a labor organization	Case Nos. C2-175 C3-175 C6-175 C7-175 C8-175

William A. Gibney,
for the General Counsel.

James Rutkowski & William DeBiase of Phoenix, Arizona,
for the Respondent, United Farm Workers of America, AFL-CIO

J. W. CHERRY, Trial Examiner:

Based on charges filed on January 23, 1975 by Roy's Arizona Pharmacy, Tucson, Arizona; Pueblo Liquor Stote, Tucson, Arizona, and Fritz's Liquors, Tucson, Arizona, and on charges filed on January 24, 1975 by Market Spot, Tucson, Arizona, and Super City Department Stores, Tucson, Arizona, the Complaints herein were issued on February 27, 1975, alleging that the United Farm Workers of America, AFL-CIO, hereinafter referred to as the Union or Respondent, violated Sections 23-1385(B)(6), 23-1385(B)(7) and 23-1381 of the Arizona Revised Statutes, hereinafter referred to as the Act.

On March 10, 1975, counsel for the Respondent filed a Motion to Dismiss, and pursuant to notice, a hearing was held in Phoenix, Arizona, on April 10, 1975, before the undersigned, duly designated Trial Examiner. Briefs were received from the General Counsel and the Respondent and oral argument was presented by the General Counsel and Respondent's attorney.

The Respondent contends that the conduct complained of constitutes protected free speech. Not having the benefit of a full record, but relying on the statements of General Counsel and Counsel for the Respondent as to some of the activities of the pickets or pamphleteers, it would appear that pamphlets were passed out to prospective customers, that pickets marched in front of the various establishments carrying signs requesting customers not to buy Gallo wine, that the pickets requested customers not to patronize the various business establishments and that one of

the objectives of Respondent was to cause any or all of the prospective customers to cease doing business with the charging parties.

The Arizona Agricultural Employment Relations Act is similar in many respects to the National Labor Relations Act and the interpretations of the NLRA are most helpful in this proceeding.

In *Hoffman v. Cement Masons Union, etc.*, 468 F.2d 1187, cert. denied, 411 U.S. 986, the Ninth Circuit Court held that a Union may follow the struck product into the secondary establishment, only if such secondary boycott does not attempt to influence customers to completely cease all transactions with the neutral employer. The Court stated at p. 1191,

> "Asking the public to totally boycott a neutral, is tantamount to a demand that he cease dealing with the primary object of the Union's grievance. It is just such activity which the Act prohibits."

The Court further stated:

> "Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the Union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product." Tree Fruit, 55 L.R.R.M. 2961, 377 U.S. 58, 84 S.Ct. 1063.

I therefore find that the acts alleged in the complaint are not an infringement of Respondent's protected free speech.

The Respondent contends that the decision of the Superior Court in *Safeway v. United Farm Workers*, C-278338, is *res judicata* to the instant proceedings.

In *NLRB v Denver Building and Construction Trade Council*, 341 U.S. 675 (1951), the Supreme Court of the United States considered the same contensions under similar provisions of the L.M.R.A. and held that the refusal of the District Court to issue an injunction on the basis that no violation of the National Labor Relations Act occurred is not *res judicata* of any issue later to be resolved by the Board. In addition to the remedies available before the Board, the injured party may either before or after a Board finding of an unfair labor practice proscribed by Section 8(b)(4) of the L.M.R.A. maintain an action under Section 303 of the L.M.R.A. in Federal District Court for damages resulting from any activity or conduct defined as an unfair labor practice in Section 8(b)(4) of the L.M.R.A.

Thus, in *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corporation*, 342 U.S. 237, the Supreme Court of the United States held that the administrative remedy through the NLRB and the remedy of damages under Section 303 are independent of each other and could be pursued simultaneously. The NLRB is given primary jurisdiction to determine whether or not there have been unfair labor practices, and if so, to fashion appropriate remedies, while the function of the Court is to award damages suffered as a result of certain activities which were also unfair labor practices. The NLRB, and in this instance the Agricultural Employment Relations Board, cannot award damages. The Court can. Moreover, Section 301 of the Labor Management Relations Act permits suits for violation of contracts between an employer and a labor organization. In *Smith v. Evening News Association*, 371 U.S. 195, the Supreme Court of the United States held that:

> "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301 but it is not exclusive and does not destroy the jurisdiction of the Courts in suits under § 301."

Section 23-1393 of the Arizona Agricultural Employment Relations Act likewise permits a party aggrieved by an alleged violation of the Act to seek damages which result from such violation, the party may request and the Court may grant just and appropriate injunctive relief and damages. By Section 23-1390 of the Arizona Agricultural Employment Relations Act, the Agricultural Employment Relations Board is given power and authority to prevent any person from engaging in unfair labor practices. The Board is also given the power and authority to conduct hearings and determine whether or not unfair labor practices have been committed. If it finds that an unfair labor practice has been committed, the Agricultural Employment Relations Board is empowered to issue an order requiring such person to decease and desist from such unfair labor practice and to take such affirmative action, including reinstatement of employees with or without back-pay, as will effectuate the policies of the Act. The Agricultural Employment Relations Board is given primary jurisdiction over unfair labor practices and the remedies therefor. The Arizona Agricultural

Employment Relations Act makes the Agricultural Employment Relations Board, not the Court, responsible for determining whether or not an unfair labor practice has been committed, and if so, to fashion the appropriate remedy. The awarding of damages, if any, is for the Court, not the Board. The Court is also empowered to hear and decide petitions for injunctive relief either by the party aggrieved or by the Board. The jurisdiction of the Agricultural Employment Relations Board is obviously different from that of the Court and neither should encroach upon the jurisdiction of the other.

I therefore find that the Superior Court proceeding is not *res judicata* to the action pending before the Agricultural Employment Relations Board.

IT IS HEREBY ORDERED that the Respondent's Motion to Dismiss be denied.

DATED this 23rd day of April, 1975.

J. W. Cherry, Trial Examiner

EXHIBIT 11B

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

UNITED FARM WORKERS OF AMERICA, AFL-CIO, a Labor Organization, RICHARD COOK, PAT BONNER and PETER KERR, *Plaintiffs,* vs. AGRICULTURAL EMPLOYMENT RELATIONS BOARD and SAFEWAY STORES, INC., real party in interest. *Defendants*	No. C288257 FINDINGS OF FACT CONCLUSIONS OF LAW, and PRELIMINARY INJUNCTION

This cause coming to be heard on the motion of the plaintiffs for a preliminary injunction; and due notice having been given to defendants who appeared through counsel and the Court having read the verified Complaint and considered the memoranda and argument of counsel:

FINDINGS OF FACT

1. Plaintiff United Farm Workers of America (Union) is a labor organization which seeks to represent agricultural employees in collective bargaining with agricultural employers. Plaintiffs Richard Cook, Pat Bonner and Peter Kerr are agents or representatives of the Union.

2. The Agricultural Employment Relations Board (Board) is an administrative Board established by the Arizona Agricultural Employment Relations Act (Act), ARS §§ 23-1381 through 23-1395.

3. Safeway Stores, Inc., (Safeway) is a Maryland corporation which operates retail stores in the state of Arizona for the purpose of selling food and related products to the public.

4. On June 12, 1973, Safeway filed a complaint against the Union in Maricopa County Superior Court, No. C278338. This complaint arose from the Union's boycott and picketing activities at several Safeway stores in Tucson and Phoenix.

5. Safeway's complaint in the above action alleged that the Union had committed several unfair labor practices prohibited by ARS 23-1385(B) of the Act. Safeway invoked jurisdiction of the Superior Court under ARS § 23-1393(A) of the same Act and sought both injunctive relief and damages.

6. Litigation involving evidentiary hearings, legal memorandum, plus oral arguments and rehearings took place in action C278338 between June 15, 1973 and November 21, 1973. Motions and Applications to Intervene submitted by the Board and Arizona Grape Growers Association in case No. 278338 were denied

by the Superior Court. These proceedings culminated in the preliminary injunction entered December 13, 1973. This injunction was made permanent by stipulation of the parties on February 27, 1974.

7. In arriving at its decision in No. C278338 the Maricopa County Superior Court ruled upon the allegation by Safeway that the Union violated provisions found in ARS § 23-1385(B).

8. On February 4, 1974 the Board through its executive secretary notified the Union that it had scheduled a hearing for February 19, 1974 in its case No. 3-673.

9. The Board's Complaint No. 3-673 was issued August 14, 1973 pursuant to the authority of ARS § 23-1390(B) after the filing of charges with the Board by Safeway on June 12, 1973. Both Safeway's charge and the Board's complaint allege violations of the same provisions of ARS § 23-1385 that were alleged in the Superior Court complaint.

10. On February 11, 1974 the Union filed the present Complaint in Special Action to enjoin the Board from hearing the complaint, claiming that the Board was precluded from doing so by both the doctrines of concurrent jurisdiction and *res judicata*.

11. On February 11, 1974 the Union filed the present Complaint in Special Action to enjoin the Board from hearing the complaint, claiming that the Board was precluded from doing so by both the doctrines of concurrent jurisdiction and *res judicata*.

CONCLUSIONS OF LAW

1. This Court exercises its jurisdiction in this matter under the Rules of Procedure for Special Action.

2. A.R.S. § 23-1393(A) grants jurisdiction to the Superior Court of the State of Arizona in the following language:

> "A. Any person who is aggrieved or is injured in his business or property by reason of any violation of this article, or violation of an injunction issued as provided in this section, may sue in any superior court having jurisdiction of the parties for recovery of any damages resulting from such unlawful action, regardless of where such unlawful action occurred and regardless of where such damage occurred, including costs of the suit and reasonable attorney fees. Upon the filing of such suit the court shall also have jurisdiction to grant such injunctive relief or temporary restraining orders as it deems just and proper. Petitions for injunctive relief or temporary restraining orders shall be heard expeditiously. Petitions for temporary restraining orders alleging a violation of § 23-1385 shall be heard forthwith and if the petition alleges that substantial and irreparable injury to the petitioner is unavoidable such temporary restraining orders may be issued pursuant to Rule 65 of the Arizona Rules of Civil Procedure."

3. ARS § 23-1390 grants to the Board jurisdiction to also determine whether or not any violations of unfair labor practices listed in ARS § 23-1385 have occurred. The Board is empowered to issue cease and desist orders against such violations and to order such affirmative action as will effectuate the Act.

4. Safeway properly invoked the jurisdiction of the Superior Court under ARS § 23-1393(A) in its Action No. C278338 on June 12, 1973. All parties to that action are now bound by the permanent injunction entered therein.

5. The Act gives the Superior Court and the Board concurrent jurisdiction to determine if the provisions of ARS § 23-1385 have been violated. The doctrine of concurrent jurisdiction now bars the Board from assuming jurisdiction of a controversy over which the Superior Court obtained jurisdiction on June 12, 1973.

6. The Board cannot rehear this same controversy for the second reason that the permanent injunction entered in C278338 now makes the controversy *res judicata*. The permanent injunction entered in C278338 constitutes a final decision on the merits of all matters raised in Complaint No. 3-673.

PRELIMINARY INJUNCTION

IT IS ORDERED, ADJUDGED AND DECREED that pending further order of this Court, the defendants AGRICULTURAL EMPLOYMENT RELATIONS BOARD and SAFEWAY STORES, INC., their respective officers, agents, representatives, employees and all other persons in active concert and participation with the, be and they hereby are restrained and enjoined:

(a) from conducting or participating in any proceedings of whatever nature in Case No. 3-673 or any case involving the dispute contained therein before the defendant Agricultural Employment Relations Board.

(b) from assuming jurisdiction or conducting any proceedings regarding any dispute where any superior court of the state of Arizona has assumed jurisdiction over that same dispute between the real parties in interest.

Providing, however, that nothing herein shall be deemed to preclude any party from exercising its right of appeal or special action, and

This being a case of first impression involving a substantial question of statutory construction and legislative intent which may most appropriately be determined by an appellate court, the Court recommends that the parties use the special action procedures to test the validity of this Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs file a bond in the sum of $50.

Done in Open Court this 3rd day of April, 1974.

Hon. Ed. W. Hughes
Judge of the Superior Court

EXHIBIT 11C

THE STATE OF ARIZONA
THE AGRICULTURAL EMPLOYMENT
RELATIONS BOARD
PHOENIX, ARIZONA

UNITED FARM WORKERS OF AMERICA, AFL-CIO, a labor organization, Respondent	Case Nos. C2-175
Williams A. Gibney General Counsel, Phoenix, Arizona	C3-175 C6-175 C7-175
JAMES RUTKOWSKI and WILLIAM DEBIASE of Phoenix, Arizona for the Respondent	C8-175

J. W. CHERRY, Trial Examiner:

Based on charges filed on January 23, 1975, by Roy's Arizona Pharmacy, Tucson, Arizona; Pueblo Liquor Store, Tucson, Arizona, and Fritz's Liquors, Tucson, Arizona, and on charges filed on January 24, 1975, by Market Spot, Tucson, Arizona, and Super City Department Stores, Tucson, Arizona, the complaints herein were issued on February 27, 1975, alleging that the United Farm Workers of America, AFL-CIO, hereinafter referred to as the Union or Respondent, violated Sections 23-1385(B)(6), 23-1385(B)(7) and 23-1381 of the Arizona Revised Statutes, hereinafter referred to as the Act.

An answer was filed by the Respondent denying the allegations of the complaints and alleging Section 23-1385(B)(7) to be unconstitutional, the decision in *Safeway Stores, Inc. v. United Farm Workers,* Superior Court, Maricopa County, No. 278338, to be binding in this proceeding under the doctrine of *stare decisis,* and that the petitioner lacks jurisdiction.

On March 10, 1975 Respondent filed a motion to dismiss the complaints. On April 10, 1975 a hearing on said motion was held and the motion was denied by the undersigned Trial Examiner. A hearing on the merits was held in Tucson, Arizona, on May 28, 1975, and the Respondent and its Counsel failed to appear. Testimony was taken from General Counsel's witnesses and the hearing was closed on May 28, 1975.[1]

FINDINGS OF FACT

The Respondent had a labor dispute with the producers of Gallo Wine in California over representation of the farm workers who allegedly are under contract with the Teamsters Union. The Respondent, through its officers, agents and employees, in the latter part of January 1975, approached the charging parties and demanded that they remove the Gallo wine products from their shelves and stop offering it for sale. Respondent threatened that failure to comply with the aforesaid demand would result in picketing of their places of business. The charging parties refused to comply and the Respondent commenced picketing their various places of business. The pickets passed out pamphlets to prospective customers and urged

[1] On motion of General Counsel, the Complaint in C6-175 was withdrawn.

said prospective customers not to purchase Gallo products and not to patronize the stores involved.[2] The above mentioned picketing continued at most of the charging parties places of business for about six weeks or more and the picketing is now going on at other retailers of Gallo wine products in the Tucson area.

In as much as the instant case is the first to go to trial, there is limited precedent to follow and I must look to the Labor Management Relations Act for guidance, since that Act is similar to the Arizona Agricultural Employment Relations Act.

In *Hoffman v. Cement Masons Union, etc.,* 468 F.2d 1187, cert. den., 411 U.S. 986, the Ninth Circuit Court held that a union may follow the struck product into the secondary establishment, only if such secondary boycott does not attempt to influence customers to completely cease all transactions with the neutral employer. Citing the landmark case *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760,* 377 U.S. 58, 84 S.Ct. 1063, 12 L. Ed.2d 129 (1964), the Court stated at page 1191:

> "Asking the public to totally boycott a neutral, tantamount to a demand that he cease dealing with the primary object of the Union's grievance.... It is just such activity which the Act prohibits."

[2] Counsel for Respondent, when urging its motion to dismiss, stated that one of the objects of the picketing was to cause any and all prospective customers to cease doing business with the charging parties.

The Court further stated:

"Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product."

The Union's consumer boycott against a product (Gallo Wine), by picketing customers' entrances to stores selling Gallo Wine with placards and handbills urging the public not to buy the wine, even if it reduces the stores' sales and causes them to drop the wine as a poor seller, is not an unfair labor practice under the L.M.R.A. But when the avowed object of the picketing, as in the instant case, is to cause prospective customers to cease doing business with the stores in question, the picketing becomes illegal.

In the case at bar, we do not have a situation where the Respondent was merely trying to dissuade the customers of a business establishment to cease purchasing a certain product, but on the contrary we have the Respondent picketing with the admitted object of causing the customers to cease doing business with the charging parties.

The evidence clearly reflects that the Respondent, through its officers, agents and representatives, threatened the charging parties with picketing if they failed to comply with their demands, viz. stop selling Gallo Wine, and remove it from their shelves and by urging customers and prospective customers not to patronize the charging parties' stores and with the admitted object of causing their customers to cease doing any business with the charging parties, who are secondary

employers and who have no labor dispute with the Respondent, but merely purchase the primary employers' product through a local distributor.[3]

CONCLUSIONS OF LAW

By picketing and oral communications with customers and prospective customers of Roy's Arizona Pharmacy, Pueblo Liquor Stores, Market Spot and Super City Department Stores, not to shop at said stores, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 23-1385(B)(6) of the Arizona Revised Statutes.

By attempting to induce, encourage, restrain or coerce executives and management personnel of Roy's Arizona Pharmacy, Pueblo Liquor Store, Market Spot and Super City Department Stores to make a management decision not to handle, sell or distribute Gallo Wine, Respondent has engaged in unfair labor practices within the meaning of Section 23-1385(B)(7) of the Arizona Revised Statutes.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Sections 23-1385(B)(6), 23-1385(B)(7) and 23-1381 of the Arizona Revised Statutes, I recommend that it be required to cease and desist therefrom.

---

[3] The drafters of the Agricultural Employment Relations Act failed to include a proviso permitting lawful product boycotts, which may taint its constitutionality, but it is not the Trial Examiner's prerrogative to rule on the constitutionality of the act in a quasi judicial proceeding.

ORDER

Respondent, United Farm Workers of America, AFL-CIO, its officers, agents and respresentatives, shall:[4]

Cease and desist from picketing and urging customers and prospective customers not to shop at Roy's Arizona Pharmacy, Pueblo Liquor Stores, Market Spot and Super City Department Stores, or any other employers in the State of Arizona.

Cease and desist from inducing, encouraging, restraining and coercing executives and management personnel of Roy's Arizona Pharmacy, Pueblo Liquor Store, Market Spot and Super City Department Stores or any other employers in the State of Arizona, not to handle, sell or distribute Gallo Wine.

DATED AT Phoenix, Arizona this 9th day of July, 1975.

J. W. CHERRY
Trial Examiner

[4] In the event no exceptions are filed, the findings, conclusions, and recommended order herein shall be adopted by the Board and become its findings, conclusions and order.

EXHIBIT 11D

Exhibit D

THE STATE OF ARIZONA
THE AGRICULTURAL EMPLOYMENT RELATIONS BOARD
PHOENIX, ARIZONA

UNITED FARM WORKERS OF AMERICA, AFL-CIO, a labor organization, Respondent	Case Nos. C2-175 C3-175 C7-175 C8-175

EXCEPTIONS TO DECISION OF THE TRIAL EXAMINER

Pursuant to S 107, Rules and Regulations of the Agricultural Employment Relations Board, Respondent files the following exception to the decision of the trial examiner for the hearing conducted on May 28, 1975.

1. Section 23-1385 (B)(6) of the Agricultural Employment Relations Act is unconstitutional under the First and Fourteenth Amendments.

2. Section 23-1385 (B)(7) of the Agricultural Employment Relations Act is unconstitutional under the First and Fourteenth Amendments and has been so held in *Safeway Stores, Inc. v. United Farm Workers*, Superior Court, Maricopa County, No. 278338, and *Mary J. Kennard, et al. v. United Farm Workers*

Union, et al., Superior Court, Pima County, No. 154758.

3. The decisions in *Safeway*, supra, and *Mary J. Kennard*, supra, were binding on the trial examiner under the doctrine of *stare decisis*.

4. Pamphlets distributed by supporters of the United Farm Workers Union in the vicinity of the stores which were the subject of the hearing did not urge consumers to boycott these stores.

5. The decision of the trial examiner was unconstitutional under the First and Fourteenth Amendments

6. The hearing violated an injunction issued in *United Farm Workers of America, et al. v. Agricultural Employment Relations Board, et al.*, Superior Court, Maricopa County, No. C288257.

7. The Agricultural Employment Relations Board lacks subject matter jurisdiction to grant the extent of relief suggested by the Examiner. Respondents incorporate as part of and in support of these exceptions all prior Motions and Memoranda filed here in, as well as testimony presented before the Hon. Lillian Fisher.

Dated this 21 day of July, 1975.

William DeBiase
Attorney for Respondent

Copy of the foregoing
hand-delivered this
21 day of July, 1975, to:

William Gibney
General Counsel
1688 W. Adams
Room 114
Phoenix, Arizona 85007

William DeBiase
Attorney for Respondent

EXHIBIT 11E

Exhibit E

THE STATE OF ARIZONA
THE AGRICULTURAL EMPLOYMENT
RELATIONS BOARD
PHOENIX, ARIZONA

UNITED FARM WORKERS OF AMERICA, AFL-CIO, a labor organization, *Respondent.*	Case Nos.: C2-175, C3-175 C7-175, C8-175 DECISION OF THE BOARD AND ORDER

Pursuant to R4-2-04 B, Rules and Regulations of the Agricultural Employment Relations Board, it is the unanimous decision of the Board at a meeting of the Board on August 13, 1975, at Phoenix, Arizona to issue its Order regarding the decision of the Trial Examiner, J. W. Cherry, dated July 9, 1975, in the above-entitled matters as follows:

With reference to Exception Number 1 filed by Respondent, the Board has no jurisdiction as to the constitutionality of Section 23-1385 (B)(6) of the Agricultural Employment Relations Act.

With reference to Exception Number 2 the Board has no jurisdiction as to the constitutionality of Section 23-1385(B)(7) of the Agricultural Employment Relations Act.

With reference to Exception Number 3 the Board denies that the decisions in *Safeway Stores, Inc., v. United Farm Workers* and *Mary J. Kennard, et al. v. United Farm Workers Union et al.*, were binding on the Trial Examiner under the doctrine of *stare decisis*.

With reference to Exception Number 4, the Trial Examiner's decision states: "the pickets passed out pamphlets to prospective customers and urged said prospective customers not to purchase Gallo products and not to patronize the stores involved." The Trial Examiner did *not* say that the pamphlets themselves urged consumers to boycott these stores; however respondent's counsel did state that one of the objects of the picketing was to cause prospective customers to cease doing business with the charging parties (see

page 11 of the transcript of Formal Hearing on Respondent's Motion to Dismiss) and the Board therefore upholds the Trial Examiner with regard to this point.

With reference to Exception Number 5, the Board has no jurisdiction to determine that the decision of the Trial Examiner was unconstitutional under the First and Fourteenth Amendments.

With reference to Exception Number 6, the Respondents filed a Petition on June 6th to hold the Board in Contempt of Court for holding the hearing allegedly in violation of the injunction issued in *United Farm Workers of America, et al. v. Agricultural Employment Relations Board, et al*, Maricopa County Case No. C288257; this was denied by Judge Hughes on or about July 19, 1975; therefore the Board denies this exception.

With reference to Exception Number 7, the Board orders the Trial Examiner's decision to be modified as follows:

On Page five, line three, the phrase, "or any other employers in the State of Arizona" shall be deleted;

On Page five, line seven, the words, "or any other employers in the State of Arizona" shall be deleted.

BY ORDER OF THE BOARD at Phoenix, Arizona this 13th day of August, 1975.

MILTON G. SANDERS
CHAIRMAN

COPY of the foregoing mailed
this 21st day of August, 1975, to:

William DeBiase
Attorney for Respondent
P. O. Box 1621
Phoenix, Arizona 85001

By _____
Executive Secretary

EXHIBIT 12

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

EXHIBIT F

LILLIAN S. FISHER
JUDGE, of the Superior Court

THE AGRICULTURAL EMPLOYMENT RELATIONS BOARD, *Plaintiff* vs. UNITED FARM WORKERS OF AMERICA, AFL-CIO, et al., *Defendants*	No. 153789 Date April 4, 1975

Plaintiff's Attorney | Defendants' Attorneys

MINUTE ENTRY
UNDER ADVISEMENT:

The Court makes the following findings of fact:

1. That the Deft. United Farm Workers is a labor organization which seeks to represent agricultural employees in collective bargaining with agricultural employers and the other Defts. are persons acting for and on behalf of said union.

2. That Roy's Arizona Pharmacy, 647 S. 6th, Tucson, Az., Pueblo Liquor Store, 201 N. Park, Tucson, Az. and Super City Department Stores, 505 E. 17th St., Tucson, Az., are all retail establishments that come within the purview of A.R.S. 23-1321 and 23-1381 and those following in that they are associations engaged in the sale of agricultural products.

3. That each of these organizations sells at retail products marketed by Gallo Wines under various names.

4. That the United Farm Workers contends that the farmers employed by Gallo have been denied the right to choose their own union.

5. That the union through its various representatives has organized a campaign in an effort to persuade the public (a) not to shop at any of the stores that handle Gallo Wines and (b) not to purchase any of the Gallo products.

6. That the union through its agents and representatives is participating, on a regular basis, in picketing the aforementioned stores, that at each of those locations they distribute literature and carry flags and placards, and that they approach passersby, potential consumers, customers of the store and other persons in the immediate area.

7. That the pickets have been peaceful and that the union has instructed them to behave in a peaceful manner.

8. That the pickets have on occasion blocked doorways and interfered with the ingress and egress of potential customers to the stores.

The Court makes the following conclusions of law:

1. Peaceful consumer picketing that is designed to shut off all trade with a secondary employer unless that employer aids the union in its dispute with the primary employer is a forbidden activity.

2. Peaceful consumer picketing that only persuades a customer not to buy the struck product is a lawful activity protected by the First Amendment.

3. A union appeal to the public at a secondary site not to trade at all with a secondary employer reaches other goods of the secondary employer and is unlawful.

4. All peaceful picketing at a secondary site that is directed only at the struck products is lawful.

5. Secondary boycotts include picketing and boycotts directed at consumers as well as employees.

6. A union has a right to appeal to the general public as consumers for the public's assistance in its labor dispute and it is not a secondary boycott to persuade a customer not to buy a particular product.

7. It is unlawful to threaten, coerce or restrain a customer or an employee in any secondary boycott.

8. It is unlawful to ban peaceful picketing.

9. Pltf. is entitled to a preliminary injunction restraining the Defts. from conducting a secondary boycott at any of the above-named stores when such boycott extends to attempts at dissuading customers from shopping in the store at all.

10. The Pltf. is not entitled to any injunction restraining the Defts. from urging people not to buy Gallo products.

11. The Pltf. is entitled to a preliminary injunction restraining the Defts. from any attempts to hinder or obstruct persons from entering the business premises of the above-named stores.

12. Pltf. is not entitled to a preliminary injunction which in any way bars the Deft. from picketing or boycotting on public property, provided the boycotts or pickets are not directed against all of the products sold in the store.

WHEREFORE,

IT IS ORDERED that the Deft. United Farm Workers of America, its officers, agents, servants, employees, representatives and all other persons acting for and on their behalf are hereby, until further order of the Court or other agency entitled to issue superceding orders, restrained and enjoined as follows:

1. From conducting a secondary boycott on or near the premises of the above-named stores, which boycott would extend to all the products of said store. This injuction does not prohibit picketing by use of placards, handbills, flags, oral communication or any other media which specifically relates to the Gallo products or products produced under any other name by the Gallo Wine Company.

2. There shall be no restriction on the number of persons who may picket at any one location, provided that said pickets do not disturb the peace.

3. That the pickets shall at no time interfere with the right of anyone to enter or leave the above-named stores through any entrance or exit.

4. That the pickets shall not interfere with any person's attempt to get in or out of his car in any of the adjacent parking lots.

5. The placards, signs, flags or other materials carried near the business premises of the above-named stores may be specifically directed to any of the Gallo products, may urge the public not to purchase any of the Gallo products, but shall not urge upon the public not to shop at the store at all.

6. That the picketing persons shall not use the parking lot of any of the above-named stores nor shall they interfere with the movement in and out of the store's premises of any person intending to shop at the store or employees of the store or persons delivering merchandise to the store.

7. That the pickets shall behave in a peaceful, lawabiding manner at all times.

8. That this injuction supersedes all prior injunctions and orders.

9. That the Pltf's. attorney prepare a written form of order.

cc: William A. Gibney
1645 W. Jefferson
Phoenix, Az. 85003
James Rutkowski and William DeBiase
P. O. Box 1621
Phoenix, Az. 85001
Court Admin.
Hon. Lillian S. Fisher
U/A

B. Chadwick, Deputy Clerk.

STIPULATION REGARDING HARVEST AND PRE-HARVEST SEASONS

(Title Omitted in Printing)

The most labor-intensive operations in Arizona agriculture are the growing and harvesting of seasonal fruits and vegetables, accounting for approximately 75% to 80% of the total man days of work performed by agricultural employees in Arizona during a year. Of the total man days worked in Arizona agriculture, lettuce accounts for approximately 20%; citrus accounts for approximately 22%; grapes and desiduous trees account for approximately 5%-10%; vegetables, other than lettuce, including green onions, dry onions, carrots, cauliflower, broccoli, cabbage, etc., account for approximately 20%; and cantaloupes (melons) account for approximately 5% to 10%.

The full growing season for each of these crops includes the harvest operation itself, plus various pre-harvest operations, which vary according to the crop, but include operations such as thinning, weeding, etc. While the total man days of work performed on pre-harvest operations sometimes exceeds the total of the harvest (because pre-harvest operations generally occur intermittently over a longer period of time), the highest concentration of workers employed by any single grower will be during the harvest season. The harvest season usually requires two or three times as many employees as required for the pre-harvest operations, with over 50% of the harvest employees employed only during the harvest.

Because of differences in crops, areas of the state, employer practices and size of operation, market conditions, weather and other factors, it is difficult to generalize about the length of the harvest and pre-harvest seasons. Frequently, but not always, there is a time within the harvest season in which 50% or more of the highest number of agricultural employees employed at any time during the harvest are employed. This may be referred to as the "peak harvest." In some crops, there are also periods (ranging from one day to over a week) in which there may be little or no harvest activity. The harvest and pre-harvest seasons for each of the major seasonal crops listed above will vary among different individual growers during each season and for each individual grower from season to season depending upon the factors noted above. Examples of pre-harvest and harvest seasons are attached to and made a part of this stipulation. Very generally they may be summarized as follows:

A. *Lettuce.* The pre-harvest activities include thinning, doubling and weeding, and usually last from six to ten weeks, ending just before the harvest. There are two basic kinds of lettuce operations in Arizona. About 28% of the lettuce is harvested over a five to six month continuous season in the Yuma area. About 72% of the lettuce is harvested in separate spring and fall harvests. These operations are located in various parts of Arizona, inlcuding the Phoenix area, the Yuma area, the Marana-Eloy area and the Wilcox area. For these operations, Plaintiffs believe the length of the full harvest season for a particular grower generally ranges from four to seven weeks; while Defendants and Intervenors believe it generally ranges from four

to eight weeks, with the most being six to seven weeks. Plaintiffs believe there is usually a peak harvest period (in which at least 50% of the highest number of employees employed at any time during the harvest are employed), which generally lasts from three to four weeks. Defendants and Intervenors believe most lettuce harvests do not have a peak season; but that, when they do, it generally lasts from four to six weeks.

B. *Citrus,* including lemons, oranges, grapefruits. Citrus is harvested in Arizona over a period of ten to eleven months, from about September 1 to mid-July. Most of the growers contract for the harvesting of their fruit with a packing house engaged in harvesting operations which keeps its crews busy on a continuous basis throughout the harvest, even though the crews may move within a localized area from one orchard to another and back again.

C. *Grapes.* The harvest of grapes occurs once a year from about mid-June to mid or late-July. The harvest season for any individual grower lasts from four to six weeks, with most lasting about five weeks. There is usually a peak harvest period within the season (in which 50% or more of the highest number of employees employed during the harvest season will be employed) which generally lasts from three to four weeks.

The cultivation of grapes consists of several pre-harvest operations, such as pruning, tying, thinning, girdling and tipping, performed intermittently from mid-December to around the first of June. At an average size ranch, the highest number of workers employed in any pre-harvest operation will range from 100 to 150 employees; and the highest number of

workers employed during the peak harvest season will range from 300 to 500 employees.

D. *Vegetables,* including green onions, dry onions, cauliflower, carrots, broccoli, etc. Vegetables other than lettuce include crops with widely varying harvest seasons. It is almost impossible to generalize about the length of harvests because practices vary so greatly. However, the following are examples of harvest seasons for two of the crops; green onions and dry onions. Most vegetable growers will have several types of vegetables each year, with the harvest spaced or staggered to some extent. Employers do not always have each new crop ready for harvest at the end of the harvesting of the preceding crop. For this reason, and due to different piece rates paid to harvest workers, individual workers may work intermittently for a particular grower for a period of several days or several weeks. Defendants and Intervenors believe (but Plaintiffs do not) that many workers work for a particular grower for several months.

1. Green onions are the most labor intensive crop of the vegetables. They may be harvested up to ten months of the year. Most growers stagger planting of different fields so they may harvest throughout most of the year.

2. The harvest of a field of dry onions usually takes about two to four weeks.

E. *Cantaloupes* (melons) are harvested once a year beginning in early June. Plaintiffs believe the harvest season generally lasts for a period ranging from three to seven weeks, with the peak of the harvest generally lasting two to three weeks. Defendants and Interven-

ors believe the season lasts from five to seven weeks with a peak of about three weeks.

The attached exhibits show the number of employees working in harvest and pre-harvest activities of the five major crops for generally representative growers during 1974, 1975 and 1976. The lettuce growers include one large Yuma grower exemplifying the 28% of the growers who have a single 5½ month harvest (Pasquinelli); and one large (Interharvest), two medium (J. A. Wood and J. R. Norton), and two small (Cactus and Action Produce) growers exemplifying the two-season growers. For citrus, Arizona Citrus Growers, operating in Central Arizona, is an example of a citrus harvester. The three grape growers (Tenneco, Boswell and Bodine) are representative mid-size harvesters. Phoenix Vegetable is an example of a vegetable grower; its green onion experience is shown. In melons, Bodine is representative of the small growers; and Pasquinelli is representative of the large growers.

This stipulation is entered into for the purposes of this case only.

DATED this 17th day of January, 1977.

Respectfully submitted,
JENNINGS, STROUSS & SALMON

By _____
Jon L. Kyl
Larry L. Smith
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Intervenors

_____
James Rutkowski
ACLU Foundation of Southern California
633 South Shatto Place
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_____
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By _____
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Assistant Attorney General
1700 West Washington
Phoenix, Arizona 85007
Attorneys for Defendants

AGRICULTURAL EMPLOYMENT LABOR RELATIONS BOARD

By _____
William A. Gibney
General Counsel
1688 West Adams, Room 114
Phoenix, Arizona 85007
Attorneys for Defendants

LETTUCE

[Letterhead of Pete Pasquinelli]

JANUARY 13, 1977:

GENTLEMEN:

I HEREBY CERTIFY THAT TO THE BEST OF MY KNOWLEDGE, THE FIGURES FOR EMPLOYEES USED IN THE PRE-HARVEST AND HARVEST OF LETTUCE AND PRE-HARVEST AND HARVEST OF CANTALOUPES IN MY ORGANIZATION FOR THE YEAR 1974, ARE TRUE AND CORRECT FROM MY AVAILABLE PAYROLL RECORDS. THESE FIGURES DO NOT INCLUDE THE USE OF OTHER EMPLOYEES IN OTHER FARMING OPERATIONS, SUCH AS TRACTOR OPERATORS, IRRIGATORS, HOVEL CREWS AND ETC:

_____
GARY J. PASQUINELLI:
GENERAL MANAGER:

SUBSCRIBED AND SWORN TO BEFORE ME, THIS 13th DAY OF JANUARY, 1977:

_____
C. O. STAFFORD:
NOTARY PUBLIC:

My Commission Expires Feb. 27, 1978

PETE PASQUINELLI

Year 1974 Dates of Year:	Lettuce:		Lettuce & Cantaloupes Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
1/1 TO 1/8:	67	190	0	0
1/9 TO 1/15:	64	192	0	0
1/16 TO 1/22:	64	182	0	0
1/23 TO 1/29:	61	186	0	0
1/30 TO 2/5:	25	170	0	0
2/6 TO 2/12:	25	165	0	0
2/13 TO 2/19:	25	163	0	0
2/20 TO 2/26:	25	163	17	0
2/27 TO 3/5:	23	125	30	0
3/6 TO 3/12:	0	130	39	0
3/13 TO 3/19:	0	140	40	0
3/20 TO 3/26:	0	145	39	0
3/27 TO 4/2:	0	140	44	0
4/3 TO 4/9:	0	90	45	0
4/10 TO 4/16:	0	51	46	0
4/17 TO 4/23:	0	50	46	0
4/24 TO 4/30:	0	0	46	0
5/1 TO 5/7:	0	0	100	0
5/8 TO 5/14:	0	0	120	0
5/15 TO 5/21:	0	0	154	0
5/22 TO 5/28:	0	0	163	30
5/29 TO 6/4:	0	0	80	31
6/5 To 6/11:	0	0	40	150
6/12 TO 6/18:	0	0	30	300
6/19 TO 6/25:	0	0	15	340
6/26 TO 7/2:	0	0	0	316
7/3 TO 7/9:	0	0	0	190
7/10 TO 7/16:	0	0	0	53

Year 1974 Dates Of Year:	Lettuce:		Lettuce & Cantaloupes Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
7/17 TO 7/23:	0	0	0	0
7/24 TO 7/30:	0	0	0	0
7/31 TO 8/6:	0	0	0	0
8/7 TO 8/13:	0	0	0	0
8/14 TO 8/20:	0	0	0	0
8/21 TO 8/27:	0	0	0	0
8/28 TO 9/3:	0	0	0	0
9/4 TO 9/10:	0	0	0	0
9/11 TO 9/17:	30	0	0	0
9/18 TO 9/24:	48	0	0	0
9/25 TO 10/1:	100	0	0	0
10/2 TO 10/8:	60	0	0	0
10/9 TO 10/15:	200	0	0	0
10/16 TO 10/22:	284	0	0	0
10/23 TO 10/29:	279	0	0	0
10/30 TO 11/5:	160	0	0	0
11/6 TO 11/12:	160	0	0	0
11/13 TO 11/19:	110	37	0	0
11/20 TO 11/26:	99	92	0	0
11/27 TO 12/3:	60	125	0	0
12/4 TO 12/10:	35	263	0	0
12/11 TO 12/17:	24	265	0	0
12/18 TO 12/24:	20	280	0	0
12/25 TO 12/31:	20	246	0	0

[Letterhead of Pete Pasquinelli]

JANUARY 13, 1977:

GENTLEMEN:

I HEREBY CERTIFY THAT TO THE BEST OF MY KNOWLEDGE, THE FIGURES FOR EMPLOYEES USED IN THE PRE-HARVEST AND HARVEST OF LETTUCE AND PRE-HARVEST AND HARVEST OF CANTALOUPES IN MY ORGANIZATION FOR THE YEAR 1975, ARE TRUE AND CORRECT FROM MY AVAILABLE PAYROLL RECORDS. THESE FIGURES DO NOT INCLUDE THE USE OF OTHER EMPLOYEES IN OTHER FARMING OPERATIONS, SUCH AS TRACTOR OPERATORS, IRRIGATORS, SHOVEL CREWS AND ETC:

GARY J. PASQUINELLI:
GENERAL MANAGER:

SUBSCRIBED AND SWORN TO BEFORE ME, THIS 13th DAY OF JANUARY, 1977:

C. O. STAFFORD:
NOTARY PUBLIC:

My Commission Expires Feb. 27, 1978

PETE PASQUINELLI

Year 1975: Dates of Year:	Lettuce:		Lettuce & Cantaloupes: Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
1/1 TO 1/7:	63	253	0	0
1/8 TO 1/14:	64	255	0	0
1/15 TO 1/21:	65	255	0	0
1/22 TO 1/28:	65	258	0	0
1/29 TO 2/4:	26	248	0	0
2/5 TO 2/11:	24	242	0	0
2/12 TO 2/18:	23	246	0	0
2/19 TO 2/25:	22	242	0	0
2/26 TO 3/4:	18	233	27	0
3/5 TO 3/11:	0	233	43	0
3/12 TO 3/18:	0	220	45	0
3/19 TO 3/25:	0	227	47	0
3/26 TO 4/1:	0	225	49	0
4/2 TO 4/8:	0	290	90	0
4/9 TO 4/15:	0	278	110	0
4/16 TO 4/22:	0	266	120	0
4/23 TO 4/29:	0	0	117	0
4/30 TO 5/6:	0	0	140	0
5/7 TO 5/13:	0	0	160	0

Year 1975 Dates of Year:	Lettuce:		Lettuce & Cantaloupes: Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
5/14 TO 5/20:	0	0	175	0
5/21 TO 5/27:	0	0	173	0
5/28 TO 6/3:	0	0	173	0
6/4 TO 6/10:	0	0	140	169
6/11 TO 6/17:	0	0	142	163
6/18 TO 6/24:	0	0	138	163
6/25 TO 7/1:	0	0	122	166
7/2 TO 7/8:	0	0	0	357
7/9 TO 7/15:	0	0	0	355
7/16 TO 7/22:	0	0	0	355
7/23 TO 7/29:	0	0	0	0
7/30 TO 8/5:	0	0	0	0
8/6 TO 8/12:	0	0	0	0
8/13 TO 8/19:	0	0	0	0
8/20 TO 8/26:	0	0	0	0
8/27 TO 9/2:	0	0	0	0
9/3 TO 9/9:	0	0	0	0
9/10 TO 9/16:	26	0	0	0
9/17 TO 9/23:	26	0	0	0
9/24 TO 9/30:	27	0	0	0
10/1 TO 10/7:	80	0	0	0
10/8 TO 10/14:	118	0	0	0
10/15 TO 10/21:	134	0	0	0
10/22 TO 10/28:	134	0	0	0
10/29 TO 11/4:	90	0	0	0
11/5 TO 11/11:	82	57	0	0
11/12 TO 11/18:	82	66	0	0
11/19 TO 11/25:	79	66	0	0
11/26 TO 12/2:	79	75	0	0

Year 1975 Dates of Year:	Lettuce:		Lettuce & Cantaloupes: Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
12/3 TO 12/9:	70	290	0	0
12/10 TO 12/16:	66	290	0	0
12/17 TO 12/23:	66	280	0	0
12/24 TO 12/30:	64	280	0	0

[Letterhead of Pete Pasquinelli]

JANUARY 13, 1977:

GENTLEMEN:

I HEREBY CERTIFY THAT TO THE BEST OF MY KNOWLEDGE, THE FIGURES FOR EMPLOYEES USED IN THE PRE-HARVEST AND HARVEST OF LETTUCE AND PRE-HARVEST AND HARVEST OF CANTALOUPES IN MY ORGANIZATION FOR THE YEAR 1976, ARE TRUE AND CORRECT FROM MY AVAILABLE PAYROLL RECORDS. THESE FIGURES DO NOT INCLUDE THE USE OF OTHER EMPLOYEES IN OTHER FARMING OPERATIONS, SUCH AS TRACTOR OPERATORS, IRRIGATORS, SHOVEL CREWS AND ETC:

GARY J. PASQUINELLI:
GENERAL MANAGER:

SUBSCRIBED AND SWORN TO BEFORE ME, THIS 13th DAY OF JANUARY, 1977:

C. O. STAFFORD:
NOTARY PUBLIC:

My Commission Expires Feb. 27, 1978

PETE PASQUINELLI

Year 1976 Dates of Year:	Lettuce:		Lettuce & Cantaloupes Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
1/1 TO 1/6:	66	234	-0-	-0-
1/7 TO 1/13:	67	246	-0-	-0-
1/14 TO 1/20:	68	241	-0-	-0-
1/21 TO 1/27:	67	240	-0-	-0-
1/28 TO 2/3:	25	189	-0-	-0-
2/4 TO 2/10:	33	177	-0-	-0-
2/11 TO 2/17:	28	185	-0-	-0-
2/18 TO 2/24:	28	181	-0-	-0-
2/25 TO 3/2:	40	166	-0-	-0-
3/3 TO 3/9:	38	173	-0-	-0-
3/10 TO 3/16:	0	159	36	-0-
3/17 TO 3/23:	0	168	40	-0-
3/24 TO 3/30:	0	164	38	-0-
3/31 TO 4/6:	0	203	87	-0-
4/7 TO 4/13:	0	200	80	-0-
4/14 TO 4/20:	0	206	90	-0-
4/21 TO 4/27:	0	0	85	-0-
4/28 TO 5/4:	0	0	130	-0-
5/5 TO 5/11:	0	0	128	-0-
5/12 TO 5/18:	0	0	126	-0-
5/19 TO 5/25:	0	0	132	-0-
5/26 TO 6/1:	0	0	128	-0-
6/2 TO 6/8:	0	0	94	200
6/9 TO 6/15:	0	0	88	200
6/16 TO 6/22:	0	0	94	250
6/23 TO 6/29:	0	0	86	256
6/30 TO 7/6:	0	0	0	240
7/6 TO 7/13:	0	0	0	230

Year 1976 Dates Of Year:	Lettuce:		Lettuce & Cantaloupes Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
7/14 TO 7/20:	0	0	0	190
7/21 TO 7/27:	0	0	0	0
7/28 TO 8/3:	0	0	0	0
8/4 TO 8/10:	0	0	0	0
8/11 TO 8/17:	0	0	0	0
8/18 TO 8/24:	0	0	0	0
8/25 TO 8/31:	0	0	0	0
9/1 TO 9/7:	26	0	0	0
9/8 TO 9/14:	27	0	0	0
9/15 TO 9/21:	31	0	0	0
9/22 TO 9/28:	32	0	0	0
9/29 TO 10/5:	90	0	0	0
10/6 TO 10/12:	130	0	0	0
10/13 TO 10/19:	154	0	0	0
10/20 TO 10/26:	160	0	0	0
10/27 TO 11/2:	136	0	0	0
11/3 TO 11/9:	120	0	0	0
11/10 TO 11/16:	117	90	0	0
11/17 TO 11/23:	115	106	0	0
11/24 TO 11/30:	110	118	0	0
12/1 TO 12/7:	45	280	0	0
12/8 TO 12/14:	47	282	0	0
12/15 TO 12/21:	47	285	0	0
12/22 TO 12/28:	46	287	0	0

[Letterhead of INTER HARVEST INC.]

January 13, 1977

To Whom it May Concern:

The enclosed sheets are an accurate presentation of the number of field workers employed by Inter Harvest, Inc. in the state of Arizona for the years 1974, 1975, and 1976.

These figures were taken from the Company's official payroll records.

Sincerely,

_____
Shirley Taylor
Payroll Accountant

SUBSCRIBED AND SWORD BEFORE ME this 13th day of January 1977

_____
James H. Anderson
Notary Public-California

NUMBER OF EMPLOYEES - ARIZONA
1974

Week Ending	Production	Harvesting
12-29-73	248	—
01-05-74	207	—
01-12-74	189	—
01-19-74	234	—

Week Ending	Production	Harvesting
01-26-74	199	—
02-02-74	206	—
02-09-74	203	—
02-16-74	167	—
02-23-74	157	—
03-02-74	157	122
03-09-74	143	159
03-16-74	136	431 (Yuma)
03-23-74	126	606
03-30-74	112	759
04-06-74	63	776 (Centra')
04-13-74	72	576
04-20-74	65	551
04-27-74	34	192
05-04-74	33	134
05-11-74	35	—
05-18-74	33	—
05-25-74	20	—
06-01-74	21	—
06-08-74	19	—
06-15-74	19	—
06-22-74	21	—
06-29-74	20	—
07-06-74	24	—
07-13-74	37	—
07-20-74	41	—
07-27-74	41	—
08-03-74	40	—
08-10-74	49	—
08-17-74	53	—
08-24-74	59	—

Week Ending	Production	Harvesting
08-31-74	59	—
09-07-74	153	—
09-14-74	188	—
09-21-74	177	—
09-28-74	261	—
10-05-74	375	—
10-12-74	299	—
10-19-74	215	—
10-26-74	198	—
11-02-74	197	—
11-09-74	240	89
11-16-74	94	488 (Yuma)
11-23-74	92	800
11-30-74	84	796
12-07-74	49	557 (Central)
12-14-74	122	447
12-21-74	125	217

NUMBER OF EMPLOYEES - ARIZONA
1975

Week Ending	Production	Harvesting
12-28-74	230	140 Central
01-04-75	313	—
01-11-75	304	—
01-18-75	230	—
01-25-75	213	—
02-01-75	212	—
02-08-75	200	—
02-15-75	200	—
02-22-75	203	—
03-01-75	139	—

Week Ending	Production	Harvesting
03-08-75	160	111
03-15-75	118	108
03-22-75	111	281 (Yuma)
03-29-75	80	665 (Yuma)
04-05-75	40	789
04-12-75	37	820 (Central)
04-19-75	35	747
04-26-75	34	467
05-03-75	34	503
05-10-75	32	93
05-17-75	28	—
05-24-75	25	—
05-31-75	17	—
06-07-75	17	—
06-14-75	18	—
06-21-75	19	—
06-28-75	17	—
07-05-75	20	—
07-12-75	24	—
07-19-75	23	—
07-26-75	25	—
08-02-75	25	—
08-09-75	28	—
08-06-75	29	—
08-23-75	33	—
08-30-75	39	—
09-06-75	53	—
08-13-75	138	—
09-20-75	203	—
09-27-75	349	—
10-04-75	368	—

Week Ending	Production	Harvesting
10-11-75	317	—
10-18-75	159	—
10-25-75	113	—
11-01-75	119	—
11-08-75	116	—
11-15-75	60	325
11-22-75	55	579 (Central)
11-29-75	45	771 (Central)
12-06-75	42	665 (Yuma)
12-13-75	125	593
12-20-75	120	391

NUMBER OF EMPLOYEES - ARIZONA
1976

Week Ending	Production	Harvesting
12-27-75	120	138 (Yuma)
01-03-76	218	117 (Yuma)
01-10-76	265	—
01-17-76	225	—
01-24-76	217	—
01-31-76	212	—
02-07-76	214	—
02-14-76	210	—
02-21-76	162	—
02-28-76	158	285
03-06-76	149	31
03-13-76	144	368
03-20-76	74	737 (Yuma)
03-27-76	34	733 (Central)
04-03-76	33	795 (Central)
04-10-76	36	498 (Central)

Week Ending	Production	Harvesting
04-17-76	34	Yuma 411
04-24-76	31	489 Central
05-01-76	29	131
05-08-76	28	32
05-15-76	29	—
05-22-76	30	—
05-29-76	25	—
06-05-76	38	—
06-12-76	44	—
06-19-76	45	—
06-26-76	46	—
07-03-76	33	—
07-10-76	31	—
07-17-76	34	—
07-24-76	38	—
07-31-76	40	—
08-07-76	37	—
08-14-76	36	—
08-21-76	33	—
08-28-76	40	—
09-04-76	62	—
09-11-76	87	—
09-18-76	189	—
09-25-76	299	—
10-02-76	428	—
10-09-76	411	—
10-16-76	286	—
10-23-76	212	—
10-30-76	198	—
11-06-76	131	—
11-13-76	71	Yuma 190 Central

Week Ending	Production	Harvesting
11-20-76	64	820
11-27-76	50	Yuma 770 Central
12-04-76	43	843
12-11-76	141	772
12-18-76	142	479
12-25-76	136	1

[Letterhead of J. R. Norton Company]

NUMBER OF EMPLOYEES IN THE MARANA AREA DURING 1974

WEEK ENDING	PRE HARVEST EMPLOYEES	HARVEST EMPLOYEES
1-7-74	11	
1-12	9	
1-19	11	
1-26	7	
2-2	9	
2-9	11	
2-16	10	
2-23	10	
3-2	7	
3-9	11	
3-16	13	
3-23	15	
3-30	12	
4-6 & 4-8	13	187
4-13 & 4-15	15	343
4-20 & 4-22	12	375
4-29	14	331
5-4 & 5-6	9	290
5-11	5	

WEEK ENDING	PRE HARVEST EMPLOYEES	HARVEST EMPLOYEES
5-25	2	
6-29	5	
7-6	4	
8-3	4	
8-10	10	
8-17	14	
8-24	12	
8-31	14	
9-7	12	
9-14	14	
9-21	9	
9-28	9	
10-5	11	
10-12	9	
10-19	8	
10-26	9	
11-2 & 11-4	9	131
11-9 & 11-11	12	190
11-16 & 11-18	12	106
11-23 & 11-25	15	95
11-30	14	
12-7	16	
12-14	16	
12-21	15	
12-28	8	

J. R. Norton Company certifies
that the above figures are correct

January 14, 1977

My Commission Expires
June 24, 1978

[Letterhead of J. R. Norton Company]

NUMBER OF EMPLOYEES IN THE MARANA AREA DURING 1975

WEEK ENDING	PRE HARVEST EMPLOYEES	HARVEST EMPLOYEES
1-14-75	12	
1-11	14	
1-18	16	
1-25	13	
2-1	13	
2-8	11	
2-15	12	
2-22	9	
3-1	10	
3-8	10	
3-15	7	
3-22	7	
3-29	11	
4-5	11	
4-12 & 4-14	11	118
4-19 & 4-21	13	215
4-26 & 4-28	14	394
5-3 & 5-5	11	466
5-10 & 5-12	12	206
5-17	7	

WEEK ENDING	PRE HARVEST EMPLOYEES	HARVEST EMPLOYEES
5-24	2	
6-75	None	
7-26	6	
8-2	10	
8-9	19	
8-16	17	
8-23	18	
8-30	17	
9-6	15	
9-13	12	
9-20	16	
9-27	18	
10-4	17	
10-11	17	
10-18	16	
10-25	18	
11-1	16	
11-8 & 11-10	17	229
11-15 & 11-17	17	281
11-22 & 11-24	18	237
11-29	23	
12-6-75	20	
12-13	21	
12-20	17	

J. R. Norton Company hereby
certifies that the above figures are correct

January 14, 1977

My Commission Expires
June 24, 1978

[Letterhead of J. R. Norton Company]

NUMBER OF EMPLOYEES IN THE MARANA AREA DURING 1976

WEEK ENDING	PRE HARVEST EMPLOYEES	HARVEST EMPLOYEES
1-3-76	8	
1-10	17	
1-17	14	
1-24	15	
1-31	15	
2-7	13	
2-14	13	
2-21	16	
2-28	15	
3-6	14	
3-13	18	
3-20	15	
3-27 & 3-29	16	37
4-3 & 4-5	14	199
4-10 & 4-12	12	379
4-17 & 4-19	14	397
4-24 & 4-26	16	391
5-1	12	
5-5 & 5-8	6	231
5-29	5	
8-7	11	
8-14	15	
8-21	21	
8-28	20	
9-4	19	
9-11	13	

WEEK ENDING	PRE HARVEST EMPLOYEES	HARVEST EMPLOYEES
9-18	13	
9-25	13	
10-2	12	
10-9	14	
10-16	14	
10-23	15	
10-30	14	
11-1	43	
11-6 & 11-8	15	235
11-13 & 11-15	12	281
11-20 & 11-22	13	270
11-27	21	
12-4-76	21	
12-11	17	
12-18	21	
12-25	10	

J. R. Norton Company hereby
certifies that the above figures are correct.

January 14, 1977

My Commission Expires
June 24, 1978

[Letterhead of J.A. WOOD COMPANY]

TO WHOM IT MAY CONCERN:

I, KERMIT HEINRICH, do solemnly swear the attached compilation of facts and figures is correct to the best of my knowledge; and that said facts and figures were taken from the permanent official payroll records of J A Wood Company; and that said facts and figures represent the total number of persons employed in the State of Arizona by J A Wood Company during the years 1974-1975-1976 at least one to six days during each pay period ending date who were either engaged in lettuce pre-harvest occupations (thinning, weeding and/or doubling) and/or lettuce harvest (cutting, trimming, packing, wrapping, closing, windrowing, loading).

Kermit Heinrich

In witness whereof I hereunto
set my hand and official seal.

1/14/77

Frank J Dugal
Notary Public
My Commission Expires Aug. 31, 1979

J. A. WOOD CO.
P. O. BOX 1696
GLENDALE, ARIZONA 85311
1974

	Pre-Harvest			Harvest		
	Yuma	Phoenix	Marana	Yuma	Phoenix	Marana
1-5-74						
1-12	63	34				
1-19	24	39				
1-26	91	46				
2-2		59				
2-9		47				
2-16		52				
2-23		65		62		
3-2	17	53		148		
3-9		85		182	144	
3-16				163	229	
3-23				49	267	
3-30					333	
4-6					313	
4-13					313	
4-20					255	
4-27					207	
5-4						
5-11						
5-18						
5-25						
6-1						
6-8						
6-15						
6-22						
6-29						
7-6						
7-13						

	Pre-Harvest			Harvest		
	Yuma	Phoenix	Marana	Yuma	Phoenix	Marana
7-20						
7-27						
8-3						
8-10						
8-17						
8-24						
8-31						
9-7						
9-14						
9-21		57				
9-28		102				
10-5	55	79				
10-12	62	63				
10-19						
10-26	75	52				
11-2	81	59				
11-9	64					
11-16		43				
11-23	40			58	191	
11-30	37			51	198	
12-7	31			48	196	
12-14				191	132	
12-21				263	46	
12-28				80		

J. A. WOOD CO.
P. O. BOX 1696
GLENDALE, ARIZONA 85311
1975

	Pre-Harvest			Harvest		
	Yuma	Phoenix	Marana	Yuma	Phoenix	Marana
1-4-75	23	54		127		
1-11		59		50		
1-18		55		92		
1-25				103		
2-1		71		29		
2-8		45				
2-15		55				
2-22		64				
3-1		54		60		
3-8		34				
3-15						
3-22		61				
3-29					97	
4-5					310	
4-12					323	
4-19					364	
4-26					325	84
5-3					119	225
5-10						160
5-17						56
5-24						
5-31						
6-7						
6-15						
6-22						
6-29						
7-5						

	Pre-Harvest			Harvest		
	Yuma	Phoenix	Marana	Yuma	Phoenix	Marana
7-12						
7-19						
7-26						
8-3						
8-10						
8-17						
8-24						
8-31						
9-6						
9-13			86			
9-20 includes 83 men of this count who travelled 1 or 2 days to Marana		184	49			
9-27 includes 44 men of this count who travelled 1 day to Marana		260				
10-4 includes 27 men of this count who travelled 2 days to Marana		115	47			
10-11 includes 17 men 1 day to Marana		116				
10-18		98				
10-25		11				
11-1						
11-8					233	41
11-15		14			304	70
11-22		15			240	87
11-29		11			263	91

	Pre-Harvest			Harvest		
	Yuma	Phoenix	Marana	Yuma	Phoenix	Marana
12-6	includes 24 men of this count who travelled to Marana 1 day harvest	11			164	75
12-13					111	
12-20					118	
12-27					91	

J. A. WOOD CO.
P. O. BOX 1696
GLENDALE, ARIZONA 85311

1976

	Pre-Harvest			Harvest		
	Yuma	Phoenix	Marana	Yuma	Phoenix	Marana
1-3-76		4			66	
1-10					34	
1-17		32				
1-24					28	
1-31		46				
2-7		82				
2-14		201			21	
2-21		101			29	
2-28		56			21	
3-6						
3-13					119	
3-20					124	
3-27		9			131	
4-3					128	
4-10					329	156
4-17					306	170
4-24					126	156
5-1						42

	Pre-Harvest			Harvest		
	Yuma	Phoenix	Marana	Yuma	Phoenix	Marana
5-8						32
5-15					59	41
5-22					177	44
5-29					270	53
6-5					325	64
6-12						
6-19						
6-26						
7-3						
7-10						
7-17						
7-24						
7-31						
8-7						
8-14						
8-21						
8-28						
9-4						
9-11						
9-18	includes 25 men of this count who travelled to Marana	97				
9-25		179				
10-2		175				
10-9		134				
10-16		80				
10-23		32				
10-30						
11-6						
11-13						
11-20						

	Pre-Harvest			Harvest	
	Yuma	Phoenix	Marana	Yuma	Phoenix	Marana
11-27					329	72
12-4					333	31
12-11					103	
12-18						
12-25					108	

[Letterhead of Cactus Kid]

The attached exhibit showing the number of employees in lettuce excludes truck drivers, equipment operators, and supervisors. It also refers to only lettuce in Arizona and no other.

Prepared by

Cactus Distributors, Inc.

_____

James J. Dorsey
Vice President

Subscribed and sworn to before me, this 13th day of January 1977.

_____

Notary Public
My Commission Expires
June 27, 1980

[Letterhead of Cactus Kid]

1974
CACTUS DISTRIBUTORS, INC.
Number of Employees
In Lettuce

Period Ending	Pre-Harvest	Harvest
1- 9	45	
1-16	25	
1-23	60	
1-30	44	
2- 6 to 2-20	none	none
2-27	14	
3- 6	none	none
3-13		71
3-20		24
3-27		82
4- 3		79
4-10		70
4-18		58
4-20 to 9-20	none	none
9-25	37	
10- 2	92	
10- 9	49	
10-16	33	
10-23	28	
10-30		78
11- 6		109
11-13		94
11-20		83
11-27		72
12- 4		63

1974
CACTUS DISTRIBUTORS, INC.

Number of Employees
In Lettuce

Period Ending	Pre-Harvest	Harvest
12-11	49	61
12-18	47	
12-25	26	

[Letterhead of Cactus Kid]

1975
CACTUS DISTRIBUTORS, INC.
Number of Employees
In Lettuce

Period Ending	Pre-Harvest	Harvest
1-15	25	
1-22	36	
1-29	29	
2- 5	39	
2-12	24	
2-19	30	
2-26	32	
3- 5	none	none
3-12	none	none
3-19		62
3-26	32	90
4- 2		96
4- 9		88
4-16		94
4-23		96
4-30	none	none
5- 7		87

1975
CACTUS DISTRIBUTORS, INC.
Number of Employees
In Lettuce

Period Ending	Pre-Harvest	Harvest
5-14		77
5-15 to 9- 1	none	none
9-10	40	
9-17	51	
9-24	63	
10- 1	30	
10- 8	27	
10-15	15	
10-22	17	
10-29		63
11- 5		88
11-12		93
11-19		101
11-26		82
12- 3		76
12-10		37
12-17	56	35
12-24	69	
12-31	69	

[Letterhead of Cactus Kid]

1976
CACTUS DISTRIBUTORS, INC.
Number of Employees
In Lettuce

Period Ending	Pre-Harvest	Harvest
1-1 to 2-15	none	none

1976
CACTUS DISTRIBUTORS, INC.
Number of Employees
In Lettuce

Period Ending	Pre-Harvest	Harvest
2-18	23	
2-25	27	
3- 3	25	
3-10	28	
3-17		59
3-24		72
3-31		67
4- 7		69
4-14		72
4-21		69
4-28		75
5-1 to 9-1	none	none
9- 8	40	
9-15	57	
9-22	52	
9-29	46	
10- 6	none	
10-13	77	
10-18	58	
10-25	none	none
11- 3		70
11-10		73
11-17		64
11-24		70
12- 1		60
12- 8		63
12-15	none	none

1976
CACTUS DISTRIBUTORS, INC.
Number of Employees
In Lettuce

Period Ending	Pre-Harvest	Harvest
12-22	22	
12-29	32	

[Letterhead of ACTION PRODUCE]

W/E		Harvest		Thinning
10-10-75	Willcox	38		-0-
10-17-75		70		-0-
10-24-75		59		-0-
10-31-75		26		-0-
11-7-75		60	Central	-0-
11-14-75		55		-0-
11-21-75		111		-0-
11-28-75		90		-0-
12-5-75		87		-0-
12-12-75		88		-0-
12-19-75		97		-0-
12-26-75		-0-		-0-
1-2-76		-0-		-0-
1-9-76		-0-		-0-
1-16-76		-0-		25
1-23-76		-0-		35
1-30-76		-0-		24
2-6-76		-0-		23
2-13-76		-0-		29
2-20-76		-0-		28
2-27-76		-0-		27
3-5-76		-0-		30

W/E		Harvest		Thinning
3-12-76		-0-		41
3-19-76		-0-		56
3-26-76		-0-		61
4-2-76		25		24
2-9-76		77		21
4-16-76		66		37
4-23-76		79	Central	38
4-30-76		49		-0-
5-7-76		54		18
5-14-76		56		36
5-21-76		55		-0-
5-28-76		45		-0-
6-4-76	Willcox	86		-0-
6-11-76		121		-0-
6-18-76		110		-0-
6-25-76		-0-		-0-
7-2-76		-0-		-0-
7-9-76		-0-		-0-
7-16-76		-0-		-0-
7-23-76		-0-		-0-
7-30-76		-0-		-0-
8-6-76		-0-		-0-
8-13-76		-0-		-0-
8-20-76		-0-		30
8-27-76		-0-		44
9-3-76		-0-		28
9-10-76		-0-		31
9-17-76		-0-		42
9-24-76		-0-		38
10-1-76		-0-		31

W/E		Harvest		Thinning
10-8-76	Willcox	49		41
10-15-76		52		-0-
10-22-76		59		-0-
10-29-76	Willcox	58		-0-
11-5-76		123		-0-
11-12-76		107	Central	-0-
11-19-76		89		-0-
11-26-76		107		-0-
12-3-76		103		-0-
12-10-76		71		-0-
12-17-76		31		-0-
12-24-76		-0-		-0-
12-31-76		-0-		22

I, Shirley McDaniel, sware the above figures were taken from Action Produce payroll records from the period October 10, 1975 thru December 31, 1976. These figures represent the number of people employed by us in our harvest operation and the thinning represents the number of people employed in thinning, hoeing and doubling. These figures do not include any other employees such as truck drivers, foremen or supervisors.

1-13-77

Shirley McDaniel, Bookkeeper

STATE OF ARIZONA }
County of Maricopa } ss

This instrument was acknowledged before me this 13th day of January, 1977, by Shirley McDaniel in witness whereof I herewith set my hand and official seal.

_____, NOTARY PUBLIC

My Commission Expires Aug. 17, 1978

CITRUS

[Letterhead of ARIZONA CITRUS GROWERS]

TO WHOM IT MAY CONCERN:

I, Otis Ralph, do solemnly swear the following compilation of facts and figures were taken from the permanent official payroll records of ARIZONA CITRUS GROWERS COOPERATIVE, and that said facts and figures represent the total number of persons employed in the State of Arizona by ARIZONA CITRUS GROWERS COOPERATIVE during the seasons, 1973-74, 1974-75, 1975-76, at least one to seven days during each pay period ending date who were engaged in the harvest activity involving citrus fruit owned by member growers of ARIZONA CITRUS GROWERS COOPERATIVE.

_____
OTIS RALPH
General Manager

In witness whereof I hereunto set my hand and official seal.

_____
Notary Public
My Commission Expires
Mar. 22, 1980

1973-74 SEASON

PAY PERIOD WEEK ENDING	HARVEST EMPLOYEES
9-04-73	30
9-11-73	39
9-18-73	99
9-25-73	130
10-02-73	161
10-09-73	191
10-16-73	200
10-23-73	171
10-30-73	166
11-06-73	152
11-03-73	196
11-20-73	172
11-27-73	171
12-04-73	195
12-11-73	173
12-18-73	161
12-25-73	183
1-01-74	233
1-08-74	225
1-15-74	196
1-22-74	160

1973-74 SEASON

PAY PERIOD WEEK ENDING	HARVEST EMPLOYEES
1-29-74	205
2-05-74	186
2-12-74	189
2-19-74	187
2-26-74	181
3-05-74	173
3-12-74	144
3-19-74	132
3-26-74	187
4-02-74	185
4-09-74	165
4-16-74	168
4-23-74	166
4-30-74	152
5-07-74	152
5-14-74	100
5-21-74	107
5-28-74	113
6-04-74	113
6-11-74	133
6-18-74	77
6-25-74	99
7-02-74	89
7-09-74	76
7-16-74	86
8-20-74	38
8-27-74	52

1974-75 SEASON

PAY PERIOD WEEK ENDING	HARVEST EMPLOYEES
9-03-74	66
9-10-74	86
9-17-74	215
9-24-74	215
10-01-74	332
10-08-74	304
10-15-74	358
10-22-74	334
10-29-74	328
11-05-74	362
11-12-74	359
11-19-74	371
11-25-74	350
12-03-74	372
12-10-74	390
12-17-74	360
12-23-74	301
12-30-74	294
1-07-75	293
1-14-75	255
1-21-75	276
1-28-75	248
2-04-75	274
2-11-75	357
2-18-75	328
2-25-75	397
3-04-75	398
3-11-75	324
3-18-75	336

1974-75 SEASON

PAY PERIOD WEEK ENDING	HARVEST EMPLOYEES
3-25-75	335
4-01-75	300
4-08-75	229
4-15-75	239
4-22-75	216
4-29-75	208
5-06-75	229
5-13-75	206
5-20-75	179
5-27-75	176
6-03-75	166
6-10-75	157
6-17-75	152
6-24-75	129
7-01-75	49
7-08-75	133
7-15-75	143
7-22-75	118
9-16-75	25
9-23-75	47
9-30-75	115

1975-76 SEASON

PAY PERIOD WEEK ENDING	HARVEST EMPLOYEES
10-07-75	146
10-14-75	147
10-21-75	171
10-28-75	152
11-04-75	153

1976-76 SEASON

PAY PERIOD WEEK ENDING	HARVEST EMPLOYEES
11-11-75	197
11-18-75	267
11-25-75	245
12-02-75	256
12-09-75	279
12-16-75	252
12-23-75	245
12-30-75	288
1-06-76	292
1-13-76	215
1-20-76	237
1-27-76	235
2-03-76	155
2-10-76	150
2-17-76	150
2-24-76	156
3-02-76	153
3-09-76	155
3-16-76	157
3-23-76	146
3-30-76	133
4-06-76	110
4-13-76	87
4-20-76	83
4-27-76	128
5-04-76	109
5-11-76	106
5-18-76	119
5-25-76	126

1976-76 SEASON

PAY PERIOD WEEK ENDING	HARVEST EMPLOYEES
6-01-76	105
6-08-76	89
6-15-76	87
6-22-76	76
6-29-76	75
7-06-76	77
7-13-76	77
7-20-76	67
7-27-76	32
8-03-76	45
8-10-76	40
8-31-76	15
9-07-76	33
9-14-76	110
9-21-76	133
9-28-76	163

GRAPES

[Letterhead of Bodine Produce Company]

TO WHOM IT MAY CONCERN:

I, Ralph Bodine, do solemnly swear the following compilation of facts and figures were taken from the permanent official payroll records of BODINE PRODUCE Company, and that said facts and figures represent the total number of persons employed in the State of Arizona by BODINE PRODUCE Company during the years, 1974, 1975, and 1976 at least one to seven days during each pay period ending date who were either engaged in a pre-harvest or harvest activity involving table grapes owned by BODINE PRODUCE Company.

_____

Ralph E. Bodine

In witness whereof I hereunto set my hand and official seal.

_____

Subscribed and sworn to me this 13th day of January 1977

My Commission Expires March 29, 1978

1974

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
1-3-74	95	0
1-10-74	88	0
1-17-74	101	0

1974

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
1-24-74	83	0
1-31-74	90	0
2-7-74	52	0
2-14-74	76	0
2-21-74	39	0
2-28-74	44	0
3-7-74	54	0
3-14-74	58	0
3-21-74	61	0
3-28-74	52	0
4-4-74	88	0
4-11-74	88	0
4-18-74	108	0
4-25-74	92	0
5-2-74	100	0
5-9-74	10	0
5-16-74	114	0
5-23-74	83	0
5-30-74	87	0
6-6-74	44	0
6-13-74	0	247
6-20-74	0	225
6-27-74	0	349
7-4-74	0	364
7-11-74	0	403
7-18-74	0	10
7-25-74	6	0
8-1-74	7	0
8-8-74	6	0

1974

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
8-15-74	0	0
8-22-74	14	0
8-29-74	4	0
9-5-74	8	0
9-12-74	10	0
9-19-74	12	0
9-26-74	16	0
10-3-74	14	0
10-13-74	13	0
1-17-74	15	0
10-24-74	11	0
10-31-74	9	0
11-7-74	1	0
11-14-74	2	0
11-21-74	1	0
11-28-74	1	0
12-5-74	2	0
12-12-74	3	0
12-19-74	56	0
12-26-74	59	0

1975

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
1-2-75	53	0
1-19-75	53	0
1-16-75	55	0
1-23-75	54	0
1-30-75	13	0
2-6-75	12	0

1975

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
2-13-75	8	0
2-20-75	21	0
2-27-75	5	0
3-6-75	6	0
3-13-75	4	0
3-20-75	6	0
3-27-75	6	0
4-4-75	56	0
4-10-75	6	0
4-17-75	8	0
4-24-75	86	0
5-1-75	56	0
5-8-75	59	0
5-15-75	63	0
5-22-75	64	0
5-29-75	71	0
6-5-75	100	0
6-12-75	7	0
6-19-75	75	0
6-26-75	23	0
6-30-75	68	0
7-3-75	0	176
7-10-75	0	170
7-17-75	0	336
7-24-75	0	365
7-31-75	0	319
8-7-75	10	0
8-14-75	8	0
8-21-75	6	0

1975

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
8-28-75	7	0
9-4-75	10	0
9-11-75	6	0
9-18-75	5	0
9-25-75	4	0
10-2-75	3	0
10-9-75	3	0
10-16-75	2	0
10-23-75	2	0
10-30-75	2	0
11-6-75	3	0
11-13-75	3	0
11-20-75	2	0
11-27-75	1	0
12-4-75	1	0
12-11-75	2	0
12-18-75	2	0
12-25-75	2	0

1976

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
1-8-76	57	0
1-15-76	60	0
1-22-76	65	0
1-29-76	13	0
2-5-76	10	0
2-12-76	8	0
2-19-76	3	0

1976

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
2-26-76	5	0
3-4-76	4	0
3-11-76	4	0
3-18-76	7	0
3-25-76	64	0
4-1-76	61	0
4-8-76	6	0
4-15-76	68	0
4-33-76	66	0
4-29-76	69	0
5-6-76	76	0
5-13-76	80	0
5-20-76	91	0
5-27-76	95	0
6-3-76	33	0
6-10-76	23	0
6-17-76	0	156
6-25-76	0	164
7-1-76	0	323
7-8-76	0	321
7-15-76	0	288
7-22-76	0	7
8-5-76	2	0
8-12-76	2	0
8-19-76	0	0
8-26-76	1	0
9-2-76	2	0
9-3-76	0	0
9-16-76	0	0

1976

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
9-23-76	0	0
9-30-76	0	0
10-7-76	0	0
10-14-76	4	0
10-21-76	2	0
10-28-76	1	0
11-4-76	0	0
11-11-76	28	0
11-18-76	2	0
11-25-76	21	0
12-2-76	30	0
12-9-76	29	0
12-16-76	48	0
12-23-76	61	0
12-30-76	56	0

[Letterhead of J. G. BOSWELL COMPANY]

TO WHOM IT MAY CONCERN:

I, H. S. Raymond, do solemnly swear the following facts and figures were taken from the permanent official payroll records of the CACTUS LANE RANCH PAYROLL, and they represent the total number of persons employed in the state of Arizona by the J. G. BOSWELL COMPANY during the years 1974, 1975, and 1976 for at least one to seven days during each pay period who were either engaged in pre-harvest or harvest activity involving table grapes owned by the J. G. BOSWELL COMPANY.

H. S. Raymond

In witness whereof I hereunto set my hand and official seal.

Notary Public
My Commission Expires
Dec. 29, 1979.

J. G. BOSWELL COMPANY
CACTUS LANE RANCH
NUMBER OF EMPLOYEES
1974

P/R date	Preharvest	Harvest
1/6	58	
1/13	59	
1/20	155	
1/27	78	
2/3	75	
2/1	58	
2/17	56	
2/24	44	
3/3	15	
3/10	15	
3/17	15	
3/24	86	
3/31	92	
4/7	98	
4/14	159	
4/21	155	
4/28	41	

P/R date	Preharvest	Harvest
5/5	56	
5/12	49	
5/19	126	
5/26	132	
6/2	55	
6/9	15	
6/16		587
6/23	15	
6/29		205
7/7		607
7/14		567
7/21		50
7/28	15	
8/4	15	
8/11	15	
8/18	15	
8/25	15	
9/1	15	
9/8	15	
9/15	15	
9/22	15	
9/29	15	
10/6	15	
10/13	15	
10/20	15	
10/27	15	
11/3	15	
11/10	15	
11/17	15	
11/24	34	
12/1	52	
12/8	62	

P/R date	Preharvest	Harvest
12/15	55	
12/22	49	
12/29	50	

1975

P/R date	Preharvest	Harvest
1/5	48	
1/12	46	
1/19	48	
1/26	53	
2/2	62	
2/9	53	
2/16	55	
2/23	45	
3/2	28	
3/9	29	
3/16	103	
3/23	15	
3/30	15	
4/6	92	
4/13	41	
4/20	114	
4/27	125	
5/4	127	
5/11	121	
5/18	68	
5/25	131	
6/1	128	
6/8	115	
6/15	68	
6/23	62	
6/29		152

1975

P/R date	Preharvest	Harvest
7/6		603
7/13		672
7/20		550
7/27		632
8/3	15	
8/10	15	
8/17	51	
8/24	15	
8/31	15	
9/7	15	
9/14	15	
9/21	15	
9/28	15	
10/5	15	
10/12	15	
10/19	15	
10/26	15	
11/2	15	
11/9	15	
11/16	15	
11/23	15	
11/30	31	
12/7	55	
12/14	55	
12/21	55	
12/28	58	

1976

P/R date	Preharvest	Harvest
1/4	51	

P/R date	Preharvest	Harvest
1/11	57	
1/18	61	
1/25	57	
2/1	58	
2/8	59	
2/15	58	
2/22	58	
2/29	53	
3/7	15	
3/14	15	
3/21	60	
3/28	61	
4/4	102	
4/11	15	
4/18	131	
4/25	73	
5/2	15	
5/9	15	
5/16	111	
5/23	96	
5/30	77	
6/6	37	
6/13		478
6/20		266
6/27		177
7/4		547
7/11		539
7/18	15	
7/25	17	
8/1	16	
8/8	15	

P/R date	Preharvest	Harvest
8/15	15	
8/22	15	
8/29	15	
9/5	15	
9/12	15	
9/19	15	
9/26	15	
10/3	15	
10/10	15	
10/17	15	
10/24	15	
10/31	15	
11/7	15	
11/14	15	
11/21	15	
11/28	42	
12/5	64	
12/12	64	
12/19	64	
12/26	62	

[Letterhead of RANCHO EL DORADO]

January 12, 1977

TO WHOM IT MAY CONCERN:

I, Edward Surabian, certify under oath that the information attached to this affidavit correctly reflects the number of persons employed in the pre-harvesting and harvesting activities at Rancho El Dorado for the years 1974, 1975 and 1976. The information was taken

directly from records of Rancho El Dorado, for which I have ultimate responsibility and with which I am personally acquainted.

The information generally reflects the number of persons employed in pre-harvest activities in the vinyards and the harvesting of grapes from the vinyards. The pre-harvest activities include: Pruning vines and trees, tying vines, suckering of stumps and crowns, pulling leaves from the vines, counting and dropping bunches from the vines, tipping bunches and girdling vines. The harvest activities include the picking and packing of the grapes. The records also include the employees working in the pre-harvesting and harvesting of a small amount of plums at Rancho El Dorado. The harvest activity generally involved twenty-five employees approximately the first day of harvesting and twenty-five employees for one additional day about four days later. The employees involved in pre-harvesting and harvesting of plums were essentially the same employees involved in the pre-harvesting and harvesting of grapes. Most, but not all, persons working in pre-harvesting activities worked later in the harvesting. In 1974, the last year peaches were harvested at Rancho El Dorado, employees were engaged in that harvest for the weeks ending May 5th and May 12th.

In addition to the numbers indicated, there was a small number of employees, averaging approximately ten, who were full-time permanent employees engaged in general farming activities, such as irrigating the fields, driving tractors, etc.

The numbers reflected in the attached records represent the number of employees who worked from one to six days in the pay period indicated.

_____

Edward Surabian

SUBSCRIBED AND SWORN to before me this 12th day of January, 1977.

_____

Notary Public

My commission expires Sept. 26, 1980

TENNECO WEST, INC.
RANCHO EL DORADO
1974
NUMBER OF EMPLOYEES

Pay Period Week Ending	Pre-Harvest Employees	Harvest Employees
January 6	54	0
January 13	50	0
January 20	67	0
January 27	93	0
February 3	110	0
February 10	102	0
February 17	87	0
February 24	27	0
March 3	3	0
March 10	3	0
March 17	3	0
March 24	3	0
March 31	14	0

Pay Period Week Ending	Pre-Harvest Employees	Harvest Empoyees
April 7	39	0
April 14	112	
April 21	79	0
April 28	121	0
May 5	106	47
May 12	138	52
May 19	174	0
May 26	45	0
June 2	36	0
June 9	92	0
June 16	0	176
June 23	0	191
June 30	0	495
July 7	0	497
July 14	42	0
July 21	2	0
July 28	1	0
August 4	0	0
August 11	0	0
August 18	0	0
August 25	0	0
September 1	0	0
September 8	1	0
September 15	4	0
September 22	3	0
September 29	3	0
October 6	3	0
October 13	6	0

Pay Period Week Ending	Pre-Harvest Employees	Harvest Empoyees
October 20	3	0
October 27	3	0
November 3	2	0
November 10	2	0
November 17	0	0
November 24	0	0
December 1	1	0
December 8	4	0
December 15	49	0
December 22	55	0
December 29	88	0

TENNECO WEST, INC.
RANCHO EL DORADO
1975
NUMBER OF EMPLOYEES

Pay Period Week Ending	Pre-Harvest Employees	Harvest Employees
January 5	84	0
January 12	85	0
January 19	84	0
January 26	119	0
February 2	119	0
February 9	53	0
February 16	33	0
February 23	29	0
March 1	4	0
March 8	4	0
March 16	4	0

Pay Period Week Ending	Pre-Harvest Employees	Harvest Empoyees
March 23	4	0
April 6	25	0
April 13	10	0
April 20	138	0
April 27	165	0
May 4	38	0
May 11	36	0
May 18	5	0
May 25	158	0
June 1	230	0
June 8	176	0
June 15	65	0
June 22	67	49
June 29	14	156
July 6	0	284
July 13	0	545
July 20	0	520
July 27	0	488
August 3	7	0
August 10	2	0
August 17	1	0
August 24	0	0
August 31	0	0
September 7	12	0
September 14	9	0
September 21	9	0
September 28	8	0
October 6	4	0

Pay Period Week Ending	Pre-Harvest Employees	Harvest Empoyees
October 12	10	0
October 19	8	0
October 26	10	0
November 2	9	0
November 9	12	0
November 16	16	0
November 23	15	0
November 30	13	0
December 7	16	0
December 14	63	0
December 21	66	0
December 28	51	0

TENNECO WEST, INC.
RANCHO EL DORADO
1976
NUMBER OF EMPLOYEES

Pay Period Week Ending	Pre-Harvest Employees	Harvest Employees
January 4	40	0
January 11	62	0
January 18	63	0
January 25	91	0
February 1	86	0
February 8	88	0
February 15	70	0
February 22	25	0
February 29	28	0
March 7	0	0

Pay Period Week Ending	Pre-Harvest Employees	Harvest Empoyees
March 14	1	0
March 21	11	0
March 28	10	0
April 4	145	0
April 11	162	0
April 18	14	0
April 25	161	0
May 2	39	0
May 9	122	0
May 16	173	0
May 23	149	0
May 30	37	0
June 6	66	0
June 13	0	173
June 20	0	206
June 27	0	346
July 4	0	532
July 11	0	551
July 18	16	0
July 25	3	0
August 1	5	0
August 8	13	0
August 15	2	0
August 22	0	0
August 29	0	0
September 5	0	0
September 12	0	0
September 19	0	0

Pay Period Week Ending	Pre-Harvest Employees	Harvest Empoyees
September 26	7	0
October 3	10	0
October 10	7	0
October 17	13	0
October 24	17	0
October 31	16	0
November 7	16	0
November 14	13	0
November 21	11	0
November 28	26	0
December 5	26	0
December 12	45	0
December 19	57	0
December 26	61	0

[Letterhead of Phoenix Vegetable Distributors]

TO WHOM IT MAY CONCERN

I, J. Don McGaffee, swear that the enclosed information taken from the payroll records of Phoenix Vegetable Distributors is correct.

It indicates the number of people employed in green onion harvest, who worked at least one day of the seven day period indicated.

J. DON McGAFFEE
SECRETARY/TREASURER

Subscribed and sworn to me this 12th day of January 1977.

Kathleen Hoover
Notary Public
My Commission Expires
March 29, 1978

GREEN ONION HARVEST
1974

Work Week Ending	People Employed
12/26- 1/1	202
1/2 - 1/8	168
1/9 - 1/15	224
1/16- 1/22	205
1/23- 1/29	314
1/30- 2/5	289
2/6 - 2/12	247
2/13- 2/19	266
2/20- 2/26	224
2/27- 3/5	352
3/6 - 3/12	270
3/13- 3/19	357
3/20- 3/26	332
3/27- 4/2	319
4/3 - 4/9	295
4/10- 4/16	259
4/17- 4/23	217
4/24- 4/30	261

Work Week Ending	People Employed
5/1 - 5/7	264
5/8 - 5/14	167
5/15- 5/21	274
5/22- 5/28	339
5/29- 6/4	336
6/5 - 6/11	131
9/23- 9/24	92
9/25-10/1	140
10/2 -10/8	201
10/9 -10/15	239
10/16-10/22	211
10/23-10/29	188
10/30-11/5	177
11/6 -11/12	320
11/13-11/19	323
11/20-11/26	307
11/27-12/3	351
12/4 -12/10	322
12/11-12/17	371
12/18-12/24	367
12/25-12/31	378

GREEN ONION HARVEST
1975

Work Week Ending	People Employed
1/1 - 1/7	332
1/8 - 1/14	412
1/15- 1/21	403

Work Week Ending	People Employed
1/22- 1/28	318
1/29- 2/4	306
2/5 - 2/11	423
2/12- 2/18	333
2/19- 2/25	400
2/26- 3/4	271
3/5 - 3/11	237
3/12- 3/18	271
3/19- 3/25	220
3/26- 4/1	225
4/2 - 4/8	185
4/9 - 4/15	309
4/16- 4/22	189
4/23- 4/30	319
4/30- 5/6	287
5/7 - 5/13	271
5/14- 5/20	281
5/21- 5/27	248
5/28- 6/3	296
6/4 - 6/10	268
6/11- 6/17	256
6/18- 6/28	161
9/29- 9/30	117
10/1 -10/7	204
10/8 -10/14	188
10/15-10/21	180
10/22-10/28	199
10/29-11/4	248

Work Week Ending	People Employed
11/5 -11/11	280
11/12-11/18	271
11/19-11/25	278
11/26-12/2	254
12/3 -12/9	338
12/10-12/16	328
12/17-12/23	301
12/24-12/30	296

GREEN ONION HARVEST
1976

Work Week Ending	People Employed
12/31- 1/6	245
1/7 - 1/12	242
1/14- 1/20	290
1/21- 1/27	338
1/28- 2/3	261
2/4 - 2/10	140
2/11- 2/17	235
2/18- 2/24	309
2/25- 3/2	353
3/3 - 3/9	280
3/10- 3/16	320
3/17- 3/23	348
3/24- 3/30	307
3/31- 4/6	296
4/7 - 4/13	289
4/14- 4/20	225

Work Week Ending	People Employed
4/21- 4/27	292
4/28- 5/4	303
5/5 - 5/11	249
5/12- 5/18	301
5/19- 5/25	307
5/26- 6/1	128
6/2 - 6/8	126
9/8 - 9/14	280
9/15- 9/21	244
9/22- 9/28	290
9/29-10/5	251
10/6 -10/12	256
10/13-10/19	257
10/20-10-26	228
10/27-11/2	239
11/3 -11/9	218
11/10-11/16	197
11/17-11/23	230
11/24-11/30	254
12/1 -12/7	251
12/8 -12/14	234
12/15-12/21	253
12/22-12/28	252

[Letterhead of Bodine Produce Company]

TO WHOM IT MAY CONCERN:

I, Ralph Bodine, do solemnly swear the following compilations of facts and figures were taken from the permanent official payroll records of BODINE PRODUCE Company, and that said facts and figures represents the total number of persons employed in the State of Arizona by BODINE PRODUCE Company during the years, 1974, 1975 and 1976 at least one to seven days during each pay period ending date who were either engaged in a pre-harvest or harvest activity involving cantaloupes and melons owned by BODINE PRODUCE Company.

_____
Ralph E. Bodine

In witness whereof I hereunto set my hand and official seal.

_____
Kathleen Hoover

Subscribed and sworn to me this 13th day of January 1977.

My Commission Expires March 29, 1978

1974

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
4-10-74	40	0
4-17-74	37	0
4-24-74	33	0
4-31-74	38	0
5- 7-74	35	0

1974

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
5-15-74	29	0
5-22-74	40	0
5-29-74	40	0
6- 6-74	60	0
6-13-74	42	0
6-20-74	35	57
6-27-74	0	276
7- 3-74	0	236
7-10-74	0	247
7-17-74	0	99
7-24-74	0	0
7-31-74	0	0
8- 7-74	19	0
8-14-74	27	0
8-12-74	0	0
8-28-74	0	0
9- 4-74	0	0
9-11-74	0	0
9-18-74	0	0
9-25-74	0	0
10- 1-74	0	15
10- 8-74	0	21
10-15-74	0	20
10-22-74	0	26
10-29-74	0	25
11- 6-74	0	22
11-13-74	0	25

1975

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
4-19-75	42	0
4-26-75	38	0
5- 3-75	47	0
5-10-75	0	0
5-17-75	39	0
5-24-75	42	0
5-31-75	29	0
6- 7-75	64	0
6-14-75	38	0
6-21-75	48	0
6-28-75	44	0
7- 2-75	0	110
7- 9-75	0	323
7-16-75	0	396
7-23-75	0	325
7-30-75	0	68
8- 2-75	23	0
8- 9-75	21	0
8-16-75	23	0
8-23-75	35	0
8-30-75	28	0
9- 6-75	37	0
9-13-75	0	0
9-20-75	53	0
9-27-75	0	0
10- 2-75	0	0
10- 9-75	0	17
10-16-75	0	27
10-23-75	0	27
10-30-75	0	36

1975

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
11- 7-75	0	28
11-14-75	0	27
11-21-75	0	21

1976

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
4-12-76	42	0
4-19-76	50	0
4-26-76	50	0
5- 3-76	55	0
5-10-76	60	0
5-17-76	58	0
5-24-76	67	0
5-31-76	64	0
6- 7-76	57	0
6-15-76	62	0
6-22-76	55	51
6-29-76	0	310
7- 6-76	0	346
7-13-76	0	261
7-20-76	0	102
7-27-76	0	0
8- 3-76	0	0
8-10-76	27	0
8-17-76	37	0
8-24-76	38	0
8-31-76	38	0
9- 7-76	44	0
9-14-76	39	0
9-21-76	42	0

1976

PAY PERIOD WEEK ENDING	PRE-HARVEST EMPLOYEES	HARVEST EMPLOYEES
9-28-76	44	0
10- 5-76	50	0
10-12-76	45	32
10-19-76	0	34
10-26-76	0	42
11- 2-76	0	39
11- 9-76	0	41
11-16-76	0	39
11-23-76	0	45
11-30-76	0	34

[Letterhead of PETE PASQUINELLI]

JANUARY 13, 1977:

GENTLEMEN:

I HEREBY CERTIFY THAT TO THE BEST OF MY KNOWLEDGE, THE FIGURES FOR EMPLOYEES USED IN THE PRE-HARVEST AND HARVEST OF LETTUCE AND PRE-HARVEST AND HARVEST OF CANTALOUPES IN MY ORGANIZATION FOR THE YEAR 1974, ARE TRUE AND CORRECT FROM MY AVAILABLE PAYROLL RECORDS. THESE FIGURES DO NOT INCLUDE THE USE OF OTHER EMPLOYEES IN OTHER FARMING OPERATIONS, SUCH AS TRACTOR OPERATORS, IRRIGATORS, SHOVEL CREWS AND ETC:

GARY J. PASQUINELLI:
GENERAL MANAGER:

SUBSCRIBED AND SWORN TO BEFORE ME, THIS 13th DAY OF JANUARY, 1977:

C. O. STAFFORD:
NOTARY PUBLIC:

PETE PASQUINELLI

Year 1974 Dates of Year:	Lettuce:		Lettuce & Cantaloupes: Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
1/1 TO 1/8:	67	190	0	0
1/9 TO 1/15:	64	192	0	0
1/16 TO 1/22:	64	182	0	0
1/23 TO 1/29:	61	186	0	0
1/30 TO 2/5:	25	170	0	0
2/6 TO 2/12:	25	165	0	0
2/13 TO 2/19:	25	163	0	0
2/20 TO 2/26:	25	163	17	0
2/27 TO 3/5:	23	125	30	0
3/6 TO 3/12:	0	130	39	0
3/13 TO 3/19:	0	140	40	0
3/20 TO 3/26:	0	145	39	0
3/27 TO 4/2:	0	140	44	0
4/3 TO 4/9:	0	90	45	0
4/10 TO 4/16:	0	51	46	0
4/17 TO 4,23:	0	50	46	0
4/24 TO 4/30:	0	0	46	0

Year 1974 Dates of Year:	Lettuce:		Lettuce & Cantaloupes Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
5/1 TO 5/7:	0	0	100	0
5/8 TO 5/14:	0	0	120	0
5/15 TO 5/21:	0	0	154	0
5/22 TO 5/28:	0	0	163	30
5/29 TO 6/4:	0	0	80	31
6/5 TO 6/11:	0	0	40	150
6/12 TO 6/18:	0	0	30	300
6/19 TO 6/25:	0	0	15	340
6/26 TO 7/2:	0	0	0	316
7/3 TO 7/9:	0	0	0	190
7/10 TO 7/16:	0	0	0	53
7/17 TO 7/23:	0	0	0	0
7/24 TO 7/30:	0	0	0	0
7/31 TO 8/6:	0	0	0	0
8/7 TO 8/13:	0	0	0	0
8/14 TO 8/20:	0	0	0	0
8/21 TO 8/27:	0	0	0	0
8/28 TO 9/3:	0	0	0	0
9/4 TO 9/10:	0	0	0	0
9/11 TO 9/17:	30	0	0	0
9/18 TO 9/24:	48	0	0	0
9/25 TO 10/1:	100	0	0	0
10/2 TO 10/8:	60	0	0	0
10/9 TO 10/15:	200	0	0	0
10/16 TO 10/22:	284	0	0	0
10/23 TO 10/29:	279	0	0	0
10/30 TO 11/5:	160	0	0	0
11/6 TO 11/12:	160	0	0	0
11/13 TO 11/19:	110	37	0	0

Year 1974 Dates of Year:	Lettuce:		Lettuce & Cantaloupes Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
11/20 TO 11/26:	99	92	0	0
11/27 TO 12/3:	60	125	0	0
12/4 TO 12/10:	35	263	0	0
12/11 TO 12/17:	24	265	0	0
12/18 TO 12/24:	20	280	0	0
12/25 TO 12/31:	20	246	0	0

[Letterhead of Pete Pasquinelli]

JANUARY 13, 1977:

GENTLEMEN:

I HEREBY CERTIFY THAT TO THE BEST OF MY KNOWLEDGE, THE FIGURES FOR EMPLOYEES USED IN THE PRE-HARVEST AND HARVEST OF LETTUCE AND PRE-HARVEST AND HARVEST OF CANTALOUPES IN MY ORGANIZATION FOR THE YEAR 1975, ARE TRUE AND CORRECT FROM MY AVAILABLE PAYROLL RECORDS. THESE FIGURES DO NOT INCLUDE THE USE OF OTHER EMPLOYEES IN OTHER FARMING OPERATIONS, SUCH AS TRACTOR OPERATORS, IRRIGATORS, SHOVEL CREWS AND ETC:

GARY J. PASQUINELLI:
GENERAL MANAGER:

SUBSCRIBED AND SWORN TO BEFORE ME, THIS 13th DAY OF JANUARY, 1977:

C. O. STAFFORD:
NOTARY PUBLIC:

My Commission Expires Feb. 27, 1978

PETE PASQUINELLI

Year 1975: Dates of Year:	Lettuce:		Lettuce & Cantaloupes: Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
1/1 TO 1/7:	63	253	0	0
1/8 TO 1/14:	64	255	0	0
1/15 TO 1/21:	65	255	0	0
1/22 TO 1/28:	65	258	0	0
1/29 TO 2/4:	26	248	0	0
2/5 TO 2/11:	24	242	0	0
2/12 TO 2/18:	23	246	0	0
2/19 TO 2/25:	22	242	0	0
2/26 TO 3/4:	18	233	27	0
3/5 TO 3/11:	0	233	43	0
3/12 TO 3/18:	0	220	45	0
3/19 TO 3/25:	0	227	47	0
3/26 TO 4/1:	0	225	49	0
4/2 TO 4/8:	0	290	90	0
4/9 TO 4/15:	0	278	110	0
4/16 TO 4/22:	0	266	120	0
4/23 TO 4/29:	0	0	117	0
4/30 TO 5/6:	0	0	140	0
5/7 TO 5/13:	0	0	160	0

Year 1975 Dates of Year:	Lettuce:		Lettuce & Cantaloupes: Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
5/14 TO 5/20:	0	0	175	0
5/21 TO 5/27:	0	0	173	0
5/28 TO 6/3:	0	0	173	0
6/4 TO 6/10:	0	0	140	169
6/11 TO 6/17:	0	0	142	163
6/18 TO 6/24:	0	0	138	163
6/25 TO 7/1:	0	0	122	166
7/2 TO 7/8:	0	0	0	357
7/9 TO 7/15:	0	0	0	355
7/16 TO 7/22:	0	0	0	355
7/23 TO 7/29:	0	0	0	0
7/30 TO 8/5:	0	0	0	0
8/6 TO 8/12:	0	0	0	0
8/13 TO 8/19:	0	0	0	0
8/20 TO 8/26:	0	0	0	0
8/27 TO 9/2:	0	0	0	0
9/3 TO 9/9:	0	0	0	0
9/10 TO 9/16:	26	0	0	0
9/17 TO 9/23:	26	0	0	0
9/24 TO 9/30:	27	0	0	0
10/1 TO 10/7:	80	0	0	0
10/8 TO 10/14:	118	0	0	0
10/15 TO 10/21:	134	0	0	0
10/22 TO 10/28:	134	0	0	0
10/29 TO 11/4:	90	0	0	0
11/5 TO 11/11:	82	57	0	0
11/12 TO 11/18:	82	66	0	0
11/19 TO 11/25:	79	66	0	0
11/26 TO 12/2:	79	75	0	0

Year 1975 Dates of Year:	Lettuce:		Lettuce & Cantaloupes: Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
12/3 TO 12/9:	70	290	0	0
12/10 TO 12/16:	66	290	0	0
12/17 TO 12/23:	66	280	0	0
12/24 TO 12/30:	64	280	0	0

[Letterhead of Pete Pasquinelli]

JANUARY 13, 1977:

GENTLEMEN:

I HEREBY CERTIFY THAT TO THE BEST OF MY KNOWLEDGE, THE FIGURES FOR EMPLOYEES USED IN THE PRE-HARVEST AND HARVEST OF LETTUCE AND PRE-HARVEST AND HARVEST OF CANTALOUPES IN MY ORGANIZATION FOR THE YEAR 1976, ARE TRUE AND CORRECT FROM MY AVAILABLE PAYROLL RECORDS. THESE FIGURES DO NOT INCLUDE THE USE OF OTHER EMPLOYEES IN OTHER FARMING OPERATIONS, SUCH AS TRACTOR OPERATORS, IRRIGATORS, SHOVEL CREWS AND ETC:

GARY J. PASQUINELLI:
GENERAL MANAGER:

Year 1975 Dates of Year:	Lettuce:		Lettuce & Cantaloupes: Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
5/14 TO 5/20:	0	0	175	0
5/21 TO 5/27:	0	0	173	0
5/28 TO 6/3:	0	0	173	0
6/4 TO 6/10:	0	0	140	169
6/11 TO 6/17:	0	0	142	163
6/18 TO 6/24:	0	0	138	163
6/25 TO 7/1:	0	0	122	166
7/2 TO 7/8:	0	0	0	357
7/9 TO 7/15:	0	0	0	355
7/16 TO 7/22:	0	0	0	355
7/23 TO 7/29:	0	0	0	0
7/30 TO 8/5:	0	0	0	0
8/6 TO 8/12:	0	0	0	0
8/13 TO 8/19:	0	0	0	0
8/20 TO 8/26:	0	0	0	0
8/27 TO 9/2:	0	0	0	0
9/3 TO 9/9:	0	0	0	0
9/10 TO 9/16:	26	0	0	0
9/17 TO 9/23:	26	0	0	0
9/24 TO 9/30:	27	0	0	0
10/1 TO 10/7:	80	0	0	0
10/8 TO 10/14:	118	0	0	0
10/15 TO 10/21:	134	0	0	0
10/22 TO 10/28:	134	0	0	0
10/29 TO 11/4:	90	0	0	0
11/5 TO 11/11:	82	57	0	0
11/12 TO 11/18:	82	66	0	0
11/19 TO 11/25:	79	66	0	0
11/26 TO 12/2:	79	75	0	0

Year 1975 Dates of Year:	Lettuce:		Lettuce & Cantaloupes: Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
12/3 TO 12/9:	70	290	0	0
12/10 TO 12/16:	66	290	0	0
12/17 TO 12/23:	66	280	0	0
12/24 TO 12/30:	64	280	0	0

[Letterhead of Pete Pasquinelli]

JANUARY 13, 1977:

GENTLEMEN:

I HEREBY CERTIFY THAT TO THE BEST OF MY KNOWLEDGE, THE FIGURES FOR EMPLOYEES USED IN THE PRE-HARVEST AND HARVEST OF LETTUCE AND PRE-HARVEST AND HARVEST OF CANTALOUPES IN MY ORGANIZATION FOR THE YEAR 1976, ARE TRUE AND CORRECT FROM MY AVAILABLE PAYROLL RECORDS. THESE FIGURES DO NOT INCLUDE THE USE OF OTHER EMPLOYEES IN OTHER FARMING OPERATIONS, SUCH AS TRACTOR OPERATORS, IRRIGATORS, SHOVEL CREWS AND ETC:

GARY J. PASQUINELLI:
GENERAL MANAGER:

SUBSCRIBED AND SWORN TO BEFORE ME, THIS 13th DAY OF JANUARY, 1977:

C. O. STAFFORD:
NOTARY PUBLIC:

My Commission Expires Feb. 27, 1978

PETE PASQUINELLI

Year 1976 Dates of Year:	Lettuce:		Lettuce & Cantaloupes Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
1/1 TO 1/6:	66	234	-0-	-0-
1/7 TO 1/13:	67	246	-0-	-0-
1/14 TO 1/20:	68	241	-0-	-0-
1/21 TO 1/27:	67	240	-0-	-0-
1/28 TO 2/3:	25	189	-0-	-0-
2/4 TO 2/10:	33	177	-0-	-0-
2/11 TO 2/17:	28	185	-0-	-0-
2/18 TO 2/24:	28	181	-0-	-0-
2/25 TO 3/2:	40	166	-0-	-0-
3/3 TO 3/9:	38	173	-0-	-0-
3/10 TO 3/16:	0	159	36	-0-
3/17 TO 3/23:	0	168	40	-0-
3/24 TO 3/30:	0	164	38	-0-
3/31 TO 4/6:	0	203	87	-0-
4/7 TO 4/13:	0	200	80	-0-
4/14 TO 4/20:	0	206	90	-0-
4/21 TO 4/27:	0	0	85	-0-
4/28 TO 5/4:	0	0	130	-0-
5/5 TO 5/11:	0	0	128	-0-

Year 1976 Dates Of Year:	Lettuce:		Lettuce & Cantaloupes Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
5/12 TO 5/18:	0	0	126	-0-
5/19 TO 5/25:	0	0	132	-0-
5/26 TO 6/1:	0	0	128	-0-
6/2 TO 6/8:	0	0	94	200
6/9 TO 6/15:	0	0	88	200
6/16 TO 6/22:	0	0	94	250
6/23 TO 6/29:	0	0	86	256
6/30 TO 7/6:	0	0	0	240
7/6 TO 7/13:	0	0	0	230
7/14 TO 7/20:	0	0	0	190
7/21 TO 7/27:	0	0	0	0
7/28 TO 8/3:	0	0	0	0
8/4 TO 8/10:	0	0	0	0
8/11 TO 8/17:	0	0	0	0
8/18 TO 8/24:	0	0	0	0
8/25 TO 8/31:	0	0	0	0
9/1 TO 9/7:	26	0	0	0
9/8 TO 9/14:	27	0	0	0
9/15 TO 9/21:	31	0	0	0
9/22 TO 9/28:	32	0	0	0
9/29 TO 10/5:	90	0	0	0
10/6 TO 10/12:	130	0	0	0
10/13 TO 10/19:	154	0	0	0
10/20 TO 10/26:	160	0	0	0
10/27 TO 11/2:	136	0	0	0
11/3 TO 11/9:	120	0	0	0
11/10 TO 11/16:	117	90	0	0
11/17 TO 11/23:	115	106	0	0
11/24 TO 11/30:	110	118	0	0

PETE PASQUINELLI

Year 1976 Dates of Year:	Lettuce:		Lettuce & Cantaloupes Cantaloupes:	
	Pre-Harvest:	Harvest:	Pre-Harvest:	Harvest:
12/1 TO 12/7:	45	280	0	0
12/8 TO 12/14:	47	282	0	0
12/15 TO 12/21:	47	285	0	0
12/22 TO 12/28:	46	287	0	0

PLAINTIFF'S EXHIBIT 1

LENGTH OF HARVEST AND PEAK HARVEST SEASONS COMPILED FROM STIPULATED RECORDS PROVIDED BY SELECTED GROWERS

GRAPES	NUMBER OF WORKERS PER NUMBER OF WEEKS										PEAK HARVEST	TOTAL HARVEST
El Dorado												
1974	176	191	495	497							2	4
1975	49	156	284	545	520	488					4	6
1976	173	206	346	532	551						3	5
Boswell												
1974	587	0	205	607	567	50					3	5
1975	152	603	672	550	632						4	5
1976	478	266	177	547	539						3	5
Bodine												
1974	247	225	349	364	403	10					5	6
1975	176	170	336	365	319						3	5
1976	156	164	323	321	288	7					4	6

LENGTH OF HARVEST AND PEAK HARVEST SEASONS COMPILED FROM STIPULATED RECORDS PROVIDED BY SELECTED GROWERS

LETTUCE	(FALL)	NUMBER OF WORKERS PER NUMBER OF WEEKS												PEAK HARVEST IN WEEKS	TOTAL HARVEST IN WEEKS
		1	2	3	4	5	6	7	8	9	10	11	12		
J. A. Wood (Yuma)															
	1974	58	51	48	191	263	80							2	6
	1975													—	—
	1976													—	—
J. A. Wood (Phoenix)															
	1974	191	198	196	132	46								4	5
	1975	233	304	240	263	164	111	118	91	66	34	0	28	5	11
	1976	59	177	270	325	329	333	103	0	108				4	8
J. A. Wood (Marana)															
	1974													—	—
	1975	48	70	87	91	75								5	5
	1976	32	41	44	53	64	72	31						5	7
W. W. Norton															
	1974	131	190	106	95									4	4
	1975	229	281	237										3	3
	1976	235	281	270										3	3

LETTUCE	(FALL)	NUMBER OF WORKERS PER NUMBER OF WEEKS												PEAK HARVEST IN WEEKS	TOTAL HARVEST IN WEEKS
		1	2	3	4	5	6	7	8	9	10	11	12		
Cactus															
	1974	78	109	94	83	72	63	61						7	7
	1975	63	88	93	101	82	76	37	35					6	8
	1976	70	73	64	70	60	63							6	6
Action (Phoenix)															
	1975	60	55	111	90	87	88	97						6	7
	1976	xxx	xxx	89	107	103	71	31						x	7
(Wilcox)															
	1975	38	70	59	26									3	4
	1976	49	52	59	58	xxx	xxx							x	6
Interharvest (Phoenix)															
	1974	89	488	xxx	xxx	xxx								x	5
	1975	325	xxx	xxx	xxx									x	4
	1976	xxx	xxx	xxx	xxx	xxx	xxx							x	6
Interharvest (Yuma)															
	1974	xxx	xxx	xxx	447	217	140							x	6
	1975	xxx	xxx	xxx	593	391	138							x	7
	1976	xxx	xxx	xxx	xxx	xxx	xxx							x	6

LETTUCE	(FALL)	NUMBER OF WORKERS PER NUMBER OF WEEKS											PEAK HARVEST IN WEEKS	TOTAL HARVEST IN WEEKS
		1	2	3	4	5	6	7	8	9	10	11	12	
Pasquinelli (Yuma)														
74-75 --------//	(23 weeks)												20	23
75-76 --------//	(24 weeks)												20	24

LETTUCE	SPRING													
	1	2	3	4	5	6	7	8	9	10	11	12		
J. A. Wood (Yuma)														
1974	62	148	182	163	49								3	5
1975	127	50	92	103	29	0	0	0	60				3	6
1976	000	000	000	000	000	000	000	000	000	000	000	000	—	—
J. A. Wood (Phoenix)														
1974	144	229	267	333	313	313	255	207					7	8
1975	97	310	323	364	325	119							4	6
1976	21	29	21	0	119	124	131	128	329	306	126		2	10

LETTUCE	SPRING	NUMBER OF WORKERS PER NUMBER OF WEEKS											PEAK HARVEST IN WEEKS	TOTAL HARVEST IN WEEKS
	1	2	3	4	5	6	7	8	9	10	11	12		
J. A. Wood (Marana)														
1974	000	000	000	000	000	000	000	000	000	000	000	000	—	—
1975	84	225	160	56									2	4
1976	156	170	156	42									3	4
W. W. Norton														
1974	187	343	375	331	290								4	5
1975	118	215	394	466	206								3	5
1976	37	199	379	397	391	0	231						5	6
Cactus														
1974	71	24	82	79	70	58							5	6
1975	62	90	96	88	94	96	0	87	77				8	8
1976	59	72	67	69	72	69	75						7	7
Action (Phoenix)														
1976	25	77	66	79	49	54	56						6	7
(Wilcox)														
1976	55	45	86	121	110								3	5

EXCERPTS FROM TESTIMONY OF CESAR E. CHAVEZ

[35*]

Q Would you please state your name for the record.

A Cesar Estrada Chavez.

Q Mr Chavez, what is your present position?

A President of the United Farm Workers of America.

Q And how long have you held this position? [36]

A Since September '73.

Q What was your position prior to being Director of United Farm Workers of America?

A Prior to being President I was the Director of the Organizing Committee.

Q For how long was that?

A That was from 1966, August of 1966.

Q Mr. Chavez, could you just briefly tell us the jurisdiction of the United Farm Workers of America?

A The jurisdiction granted us by the National AF of L CIO is the jurisdiction of agricultural workers, all workers not covered, engaged in agricultural activities not covered by the National Labor Relations Act.

Q So that your Union represents only agricultural employees.

A Exclusively, yes.

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*Page number of transcript.

Q Mr. Chavez, could you tell us, when was your first contact with agricultural labor, the agricultural industry?

A Well, as you may know, I was born on a farm so that I have been associated with agriculture since my birth.

Q And when did you first work in agriculture?

A In the small farm that my father owned here in Arizona I worked as far back as I can remember until about the age of ten or eleven when we left the farm. [37]

Q And when did you leave the farm?

A In 1937 or '38.

Q And what did you do after that?

A We went to California and became migratory workers in agriculture in California.

Q Could you just very briefly tell us some of the crops? How old were you at this time in 1938?

A Eleven years.

Q Could you tell us briefly some of the crops that you worked in during that time.

A Most of the crops in California, tree fruits, grapes, field crops, grove crops.

JUDGE MUECKE: What was that last? Grow?

JUDGE CRAIG: Grove crops.

Q (By Mr. Rutkowski) How long did you continue to migrate to various types of agricultural work?

A With a couple of interruptions, from 1938 through 1952.

Q For what reason were there interruptions?

A Toward the end of the Second World War I did two years in the Navy so that was my interruption, and then around 1950 or '51 I did a few months of work in the lumber industry.

Q After you left the Service, Mr. Chavez, what did you do then? [38]

A I came to work in agriculture.

Q And how long did you work in agriculture at this time?

A I was discharged in 1946 and I worked through 1952.

Q Again, very briefly could you give us some idea of the sort of agricultural experiences you had during this six year period.

A I worked in grapes, tomatoes, a number of different tree crops, worked in strawberries, I did some sharecropping strawberries toward the end of '52, and worked in lettuce and numerous other activities, some citrus. I don't recall all of the activities but I did work in many.

Q During this period in 1962 did you have any experience at all with labor organizations and agricultural industry?

A Prior to '52?

Q Yes.

A Yes. I was a member of at least one Union, one attempt to organize farm workers around 1946, '47, and then toward 1949 we joined some strikes and were active as members, as strikers.

Q Could you tell us what Unions those were? [39]

A Well, the National Farm Workers Union was the one in 1946 and in 1949 I believe it was the same Union.

Q You said you stopped working in agriculture in 1952. What did you do after that point?

A I begain working as a field representative for a civic action group in California known as the Community Service Organization.

Q Could you just briefly tell us what the Community Service Organization was doing during this time?

A It was a civic action group among special group people in California and Arizona. It tried to stimulate the interest of the ballot box, did a lot of work in naturalization, getting Mexican people who were not citizens to become citizens, and engaged itself in legislative work and also in service work in the rural areas to farm workers.

Q What were your responsibilities with the CSO during this time?

A I was a field representative and organizer in charge of organizing farm workers, mostly in the rural areas in California, some in Arizona, and to provide those citizenship services and also to provide service

centers to develop leadership in Spanish-speaking communities, to assist them in creating an effective voice in their own government.

Q How long were you with the CSO?

A From 1952 through early '62.

Q And did your responsibilities or position change at all during that time?

A Yes, they did. They did.

Q In what way did they change?

A I started out as a field representative in 1952 and in 1958 I believe I was made the Executive Director of the organization.

Q And at that time how large was the organization in terms of staff?

A In 1958 the staff varied about from ten people—eight minimum—to as many as forty or fifty depending on the work that we were engaged in at a particular time.

Q You mentioned much of the work of the CSO was done among farm workers. Did any of the programs of CSO work deal with labor-related problems of agricultural employees?

A Yes, we did.

Q And in what areas was the CSO involved during this time?

A Through its Service Center. We tried to provide farm workers with any and all help they needed regarding their job problems. This dealt with wages, dealt with transportation, with housing, dealt with accidents on the job, dealt with complaints against labor

contractors and employers. A lot of work was done in trying to place farm workers in jobs where they had been displaced by the bracero program. We did a lot of that, and we also did some work legislatively for them.

Q In regard to the legislative involvement of the CSO in what type of legislation was the CSO concerned about?

A We were concerned with social legislation, we were concerned with the plight of workers, particularly in the off seasons, with welfare assistance, with medical aid. We were concerned with the many problems faced by them with their labor contractors and foremen and employers.

Q During your work with the CSO did you have any—

JUDGE KILKENNY: Counsel, give us the formal name of the CSO and where was it organized and to what extent did it extend over the western states.

MR. RUTKOWSKI: Your Honor, would you like me to ask the witness those questions?

JUDGE KILKENNY: Yes, if you would ask him.

Q (By Mr. Rutkowski) Mr. Chavez, what did the initials stand for—CSO?

A Community Service Organization.

Q And what was the scope of the territory that the CSO involved at that time?

A California and Arizona, generally.

MR. RUTKOWSKI: Did that include all your questions, Your Honors?

JUDGE KILKENNY: Yes.

MR. RUTKOWSKI: Thank you.

Q (By Mr. Rutkowski) During this time of the CSO, Mr. Chavez, was there any training programs in organizing among farm workers that you were involved in?

A I was involved in an awful lot of trade programs by my supervisor and by one other person who was connected with the CSO at that time.

Q And who were the persons that you had training from?

A Mr. Fred Ross was the immediate supervisor. He was in charge of organizing at the beginning, and I had extensive training under him, and in consultation with Mr. Sulvinsky from Chicago who was then, I believe, the Director of the Industrial Area Foundation, which is one of the groups that assisted in the CSO in the service program.

Q During this period with the CSO did you have [43] any experience at all in working with labor unions that were working among farm workers?

A Yes, we did, through the official program with CSO but also through our own personal initiative we assisted a number of Unions in their attempts to organize farm workers.

Q Again we are taking, I believe now, about 1952 and '62. Could you tell us what labor unions that the CSO assisted with?

A We assisted in the organizing drives by the United Packinghouse Workers of America. We assisted to some extent the Butcher Workmen Union of America. We also were active in assisting the Agricultural Workers Organizing Committee of the AF of L CIO.

Q When did you leave the CSO, Mr. Chavez?

A In April of 1962.

Q And what did you do after that time?

A I began immediately to organize the National Farm Workers Association as a Union.

Q And why did you do that?

A In my opinion during the ten years that I spent in the CSO and prior to that, my own experience as a farm worker, I was convinced that nothing could really change substantially for farm workers unless they did what most workers in America had done, was to build their own union.

Q Just exactly what steps did you take to go about [44] beginning to build a union of farm workers?

A Well, first of all I used all of my experience that I had gained in organizing people in the CSO. I concentrated my activities in the eight counties of the San Joachin Valley in California and visited literally hundreds if not thousands of workers to try to find out those workers that were predisposed to the idea of unions to try and build a nucleus from which we could start, and this work took — I spent many months visiting crews out where they were working, visiting people at home at random, distributing leaflets, and attending meetings and other social functions of farm workers wherever they were in those areas and gener-

ally publicizing the idea I was trying to build a union and calling those who were interested to join us.

Q How many persons were you working with at this time?

A In terms of staff?

Q Yes.

A In the beginning it was just myself and my wife and later on other people joined, but in the first year and a half, first year, we were alone.

Q During these experiences of visiting farm workers in the field and in their homes and various meetings, could you just tell us briefly what were some of the problems of agricultural employees that you became aware of at that time. [45]

A The problems that workers faced during that period was the low wages, the inability to bring the complaint to be heard when they thought they were right in a firing or a demotion or when they were not paid what they were promised, and those were complaints that were given toward the employer. The complaints in general had to do with the labor contractor system and generally that they could not get organized. This was the major concern of theirs, that they could not — were not able to build unions up to that point.

Q What were your objectives in all the activities that you have told us about?

A I am sorry?

Q What were the objectives? What were your objectives in all the activities you told us of farm workers and learning their problems and so forth?

A The main objective was to build a union so we could get recognition for it and then enter the collective bargaining. We thought that those were the goals that would bring substantial gains to farm workers: recognition and then collective bargaining.

Q The phases of this activity you told us about or that you are telling me about, how long did you continue in this regard? [46]

A I did a lot of the personally organizing at the field level from 1962 through the beginning of the big strike in 1965.

I did most of the service center work. By that time we had other people join us.

In 1965 when the grape strike started in Delano, California, then I became more of an administrator and supervisor of the operation.

Q Then did the activities of the organization change significantly in 1965?

A In 1965 with the beginning of the grape strike in Delano we then went into the second phase of the drive that was to request recognition for the Union and to ask the producer, the companies, to enter collective bargaining. Prior to that, we had spent most of the time on the initial organizing phase of the Union.

Q And how long did that organizing phase take?

A Well, in the Delano area and the lower San Joachin Valley, the organizing phase took from 1962 to 1965—what we called the first phase—which involved organizing not only unions but other services for the worker.

Q In 1965 you say you made your first formal demand for recognition. [47]

A Yes.

Q Before you made this demand can you tell us what specific steps or what activity the Union took to make this demand.

A We visited most of the farm workers involved in the table grape industry in the Delano and the north and southern Tulare County areas and asked them to sign recognition cards, giving us the authorization to represent them in collective bargaining. We had a series of meetings with them and then a large membership meeting, at which point it was decided we would ask for recognition and for collective bargaining.

Q What occurred when the request for recognition was made?

A Well, nothing. No one single employer answered our letter.

We then asked the California Conciliation Service to intercede and see if through them we could get the employers to answer.

We asked a number of church organizations and other Unions to call in the growers to respond to our request. We also asked the Governor to do likewise.

JUDGE MUECKE: Which government? [48]

THE WITNESS: Governor.

JUDGE MUECKE: Oh the Governor; excuse me.

THE WITNESS: Governor Reagan.

Q (By Mr. Rutkowski) And what was the result? I think there was no farm labor legislation in California at this time for labor relations?

A In 1965?

Q Yes.

A That is right. There was no legislation.

Q And what was the result of your request of the Governor for conciliation service, the churches and so forth?

A Conciliation Services sent an official to the area, but he was not successful. The church group were not successful. I believe the Governor made—interceded anyway so that the demand was totally a failure.

Q What was the organization called at this time?

A There were two organizations. Our was called—the one I was working with—the National Farm Workers Association, and the the AF of L CIO had its organizing committe also organizing.

Q What did your organization do after the request of these groups were unsuccesful? [49]

A We called a meeting of the membership and told them that the next step we thought the only thing we could do was to engage in concerted economic activity against the employers to try and get them to recognize the Union.

Since there was no law, that was the only way open to us for recognition, and the workers agreed and a strike roll was taken and we began to strike in Delano.

Q And how long did that strike last?

A Fifty-eight and a half months.

Q Was there any other economic activity undertaken by the Union during this time?

A Not immediately but after about three or four months we saw that the strike itself—we were having a very difficult time maintaining because of lack of funds and because of the abundance of strike breakers. What we did, we then engaged in the idea of a boycott.

Q What was the extent of your personal involvement in this strike during this 58 months?

A I met with the workers, their weekly meetings, [50]
every single Friday for almost five years. I met with the workers daily at the assignment of the picket duty, and then I myself visited the workers for the first two or three years almost on a daily basis.

I was responsible for administering the finances of the Union, making the signs. I was the Chief Executive Officer of the Union then.

Q Upon what growers' work was the Union demand for recognition made during this time?

A Originally on the table fresh table grape growers in the northern Kerne County and Southern Tulare County, and then later it spread through the whole industry both in California and Arizona—fresh grapes

Q Was demand made also for workers in Arizona during this time?

A Not during that time, but a few months later, yes.

Q And had authorization cards also been collected in Arizona?

A Yes.

Q During this fifty-eight months that the strike and boycott were going on, were there other activities the Union was carrying on during this period?

A After a few months the word of the strike got out throughout—it became general knowledge among farm workers so there were many demands from farm workers throughout the country but especially in California and in some places in Arizona for union organizations, so we were also involved in organizing, doing the pre- [51]
liminary work in many of the agricultural areas in the two states.

Q During this period what other areas outside the San Joachin Valley did the Union get organizing in—specifically?

A First along the border areas in California. Some border areas in Arizona and New Mexican border. The Salinas Valley. The Imperial Valley. The Coachella Valley. And then the Central San Joachin and Northern San Joachin Valley and then there were other small areas where we began to organize the preliminary stages of the Union.

Q Were there areas in Arizona other than along the border that the Union organized?

A Yes, there were areas in—well—the San Luis-Yuma Valley areas, the areas we call the Phoenix Valley area, and I believe there was one other area on the Mexican Border. I forget the exact location of it.

JUDGE MUECKE: Excuse me. We will take a brief recess.

(Recess)

Q (By Mr. Rutkowski) Mr. Chavez, when we took a [52] recess you were telling us the Union had just begun organizing in other parts of California and the State of Arizona. Could you tell us—during this time did you travel personally to the State of Arizona during the strike and boycott there?

A Yes, I did.

Q And could you just tell us briefly in terms of your experience in California and Arizona how the condition of farm workers in Arizona compared with what you found them to be in California.

A The conditions were to me very similar. The workers in Arizona were getting slightly less money in wages, but otherwise the conditions seemed to me at that time very similar.

Q During this period of strike and boycott were any elections held by your Union with agricultural employees?

A There were some elections. There was one election held in 1966 in California.

Q And by whom was that election conducted?

A I recall that election was conducted by the American Arbitration Association.

Q Was it done pursuant to agreement between the employer and your Union?

A Yes. That was the only way elections could be [53] held then because there was no law.

Q And at what time was it agreed to have this election?

A I am sorry?

Q During what period did you agree to have the election at this time?

A The election was agreed by both the employer and our Union to be held during the time when the majority of the workers were employed.

JUDGE CRAIG: Was when?

THE WITNESS: It was in the month of August in grapes at Delano.

Q (By Mr. Rutkowski) Would that be during the peak of the harvest season?

A Yes.

Q Did the strike and boycott activites eventually lead to the signing of any collective bargaining agreements by your Union?

A Eventually it did, yes.

Q And how many agricultural employers were contracts signed—with how many agricultural employers?

A There were, as I recall now, over a hundred ranches that signed contracts with our Union.

Q And when were these contracts signed?

A There were contracts signed—prior to the settlement of that dispute we had some contracts signed in wine grapes, several contracts in wine grapes, and then in 1970, early '70, we signed our first contract with fresh grapes in the Coachella Valley, and then—this must have been in March, by the middle of April, late April, we had signed with most of the employers in fresh grapes.

Q Did any of these contracts cover the State of Arizona? Grape growers in Arizona?

A Yes.

Q In the negotiation for these contracts did you yourself participate in any of the selective bargaining sessions?

A Yes, I did.

Q And could you tell us just generally how many of these you participated in?

A I would have to estimate, but I participated in well over half of them in some form or another.

Q You are saying well over half?

A Of the negotiations, yes.

Q What were some of the main areas that the Union was concerned about negotiating when these first contracts were signed?

A The areas that we were mostly concerned with were the question of recognition, worker security, union security, the question of economics—which is

wages and fringe benefits; the question of grievance procedures were extremely important, and are very important to this day. [55]

Those were some of the areas that we were concerned with.

Q Could you briefly tell us in what way the United Farm Workers structured itself or structured its organization to participate in these collective bargaining sessions?

A In the early beginning of the Union, the first convention, it was voted that all negotiations affecting workers, that worker representatives would be present. That is mandatory in a Union. So that is what we did, was to—the known procedure is to have a series of meetings with the workers on their particular ranch and get them to list their grievances and list their demands and then for them to elect a negotiating committee reflecting as closely as possible the various classifications of work done in that farm, and then reassign from the Union staff a negotiator and in some cases an attorney to work with them.

Q Were the contracts that were eventually signed ratified by the workers?

A That is also a provision in our Constitution, that contracts are not legally binding, unless and until the workers by majority vote ratify the contracts, yes. [56]

Q After the signing of these one hundred or so contracts in the grape industry in 1970 did the United Farm Workers undertake any other activities?

A We continued to organize in other areas. We were getting quite a bit of demand from the workers in the vegetable industry and we in fact had promised them because of their demands on us during the grape strike that we could not handle two strikes at the same time but that we would go and help them as soon as the grape strike was over, so that vegetables became then one of the target areas.

Q And did the Union in fact begin organizing the vegetable industry at that point?

A We were organizing prior to that point, but once the contracts were signed in fresh grapes then in terms of organizing that became the priority.

Q Could you just briefly tell us some of the crops that your Union did begin organizing in at that time?

A In the vegetable row crop industry lettuce was the number one, but it also involved cabbage and cauliflour and carrots and squash and cucumber—the basic vegetables.

Q In the Union's expanding its activity to the vegetable industry what was your responsibility in regard to these organizing activities?

A My responsibility as the Chief Executive Officer of the Union is to direct the activities, to prepare for the Executive Board programs and budgets and goals and to assign staff, assign directors for that staff, and things along these lines.

Q Did you in effect supervise the organizing in the vegetable industry?

A I would supervise—yes, supervise the directors of its projects and in many cases personally went into the field to see for myself what was happening.

Q What type of problems did the Union discover in regard to workers in the vegetable industry?

A The problems were similar to what we discovered in grapes. There were basically the same problems. There may be some things that were peculiar to that industry that we are not faced with in grapes, but generally they are the same.

Q Was the result of this organizing, the signing of any collective bargaining agreement with vegetable growers?

A Yes, we signed, I believe, four or five contracts in the few—first sixty or ninety days of that organizing.

Q Did any of these contracts cover workers in the State of Arizona? [58]

A Yes, similar to just as they did in grapes we found that many of the companies in California are also active in Arizona in lettuce and in vegetables.

Q During the period of organizing in the vegetable industry did you have occasion to visit the State of Arizona and workers at these ranches?

A Yes, I did.

Q And did you find the conditions—how did you find the conditions of these workers and the sorts of ranches they were working on in comparison to what existed in California?

A As I recall, the conditions were very similar. The complaints were the same and the workers' needs were the same. I didn't find that much difference.

Q Did you find the lettuce industry and grape industry organized in pretty much the same fashion as California?

A Yes. Not only that, but also in many cases the same companies doing work in the two states.

Q When you talk about the same companies, what sort of companies would these be?

A Well, the Tenneco Corporation is an example. Inter-Harvest is an example. The Dispoto Company out of Delano which is called here the Centennial Company. These companies I am speaking of.

Q After the signing by the Union of contracts in grapes and lettuce what other activities, if there were any, did the Union carry on during this time?

A Well, we began to organize citrus workers, for one. We continued the organizing of vegetable workers and continued organizing wine workers in the northern part of the State. Wine grape workers, that is.

Q Were there activities undertaken to administer the contracts that you had obtained in these industries?

A Yes, a large part of our efforts and resources went, then, into consolidating the contract that we had won and to provide the basis for the instruction, the education and development of the workers and the staff to carry out this new function which was the servicing of those contracts.

Q How did you participate during this time in the instruction of workers and education of workers?

A In the very beginning we took—in regard to the question of grievances which was a big problem then, I personally participated in solving those grievances and then used that work and that experience to try to instruct the workers in how to proceed.

Then I participated in educational seminars, in meetings, in written instructions, to acquaint the workers and the staff with this new work that was about us. [60]

Q In what form did these seminars for workers take?

A It would take two forms. Sometimes it would be the whole membership that would be called into a meeting to discuss grievances, the administration of the contract, to re-explain and explain once and twice and many times what their responsibilities were, also what their gains were from the contracts.

In many cases it took the form of meeting with the ranch committees. These are the officers elected by the workers in each ranch, and also the stewards, and in some cases it took—where there was a company that had two or more ranches separated, to bring them together, to meet with them, and in some cases took a general meeting approach where we would call in three, four, five thousand workers and try to get one ethic of the program across to them.

Q The contracts were signed by the grape industry in 1970. How long did they continue?

A No, they were not.

Q Why were they not renewed?

MR. KYL: May I interpose an objection at that point as to why the contract was not renewed. It seems to me that that question gets into many factors which Mr. Chavez may or may not be able to testify to.

THE COURT: Well, perhaps we can see what his answer will be and I will grant a motion to strike if it does appear irrelevant.

MR. KYL: Certainly there is more foundation required for the question, in any event.

THE COURT: What do you wish to have supplied—in terms of what?

MR. KYL: His knowledge. The factors which would give him the authority to indicate why a grower did not renew a contract.

THE COURT: All right. That is valid. Go ahead. Lay a foundation.

MR. RUTKOWSKI: All right. I didn't intend to go into this a great deal, Your Honor.

Q (By Mr. Rutkowski) Mr. Chavez, you testified that the contracts were not renewed in 1973, is that correct?

A That is right, yes.

Q Did you meet with growers, did you negotiate with growers prior to the expiration of those contracts to attempt to renegotiate them?

A What I did, in late '72 I visited most of the growers personally at their homes, at their offices, or at a mutual place, not in a negotiating manner but to meet with them personally and try and find out what their problems were. [62]

We had problems and we tried—I tried to deal with those problems ahead of time so when negotiations came we would be prepared—for instance there were some objections to the hiring hall so I went around and spent about two months doing—in large part visiting each grower independently and personally trying to get them, to see if I could get them to agree it would be a good idea to have a joint hiring hall instead of the way it was operated just by our union, and see if we could expedite the grievances so we could have them resolved quickly because that was another complaint that we had against the employers, and generally to find out what kind of problems: complaints against the staff, complaints against the growers and management personnel. We tried to see if we could solve all these questions before we came down to the formal negotiations.

Q Did you also, during this time, meet with workers to discuss negotiating the same contracts?

A Yes. During the same period of time we were trying to get the fresh grape growers in Arizona, in Coachella Valley, in the lower San Joachin Valley, the Central Valley and north San Joachin Valley to see if we could present to the employers uniform contracts and so we spent a lot of time with the workers trying to adjust the various differences because of growing seasons or whatever or because of past practices to see if we could come to the employers with one master [63]

contract and also, of course, to take the workers' demand that they were making for that year.

Q Did the workers you spoke with indicate to you whether or not they wanted the contract renegotiated?

A Oh certainly, sure, all of them did, yes.

Q Why in 1973 were these contracts not renegotiated with the growers that you had contracts with prior to that time?

MR. KYL: Excuse me. Your Honor, may I again object to the fact that the contract was not negotiated. He can certainly testify why the grower refused to negotiate with him—

JUDGE MUECKE: Do you have an opinion why none of the growers refused to negotiate the contract?

THE WITNESS: Yes.

JUDGE MUECKE: What do you base that opinion on? Before you give us the opinion.

THE WITNESS: Okay. I base the opinion on observations, on past history, and on some of the things that growers themselves told me.

JUDGE MUECKE: During this period and then some of the things you had learned by past history—what do you mean by that?

THE WITNESS: Things that were not problems to the employers in 1970 were tremendous problems to them in 1973. We also, after the contracts were not negotiated some of the growers told me confidentially and personally why they were not negotiated.

MR. KYL: My it please the Court, I would object, then, on the basis of hearsay, that any opinion he would express would be incompetent.

JUDGE MUECKE: I would overrule it. Part of the problem is if we were to gather together everyone that each of you are going to have to give opinions about things and where they derive their opinion we could very well go for two months.

The record may note your objection. Go ahead, please.

Q (By Mr. Rutkowski) Mr. Chavez, what is your opinion as to why these contracts were not renegotiated in 1973?

A The overriding factor, we believe, was that the employers had made a deal before the contracts expired to sign with the Teamsters, and as evidence proved later on, that was the case. [65]

Q Did the growers sign contracts with the Teamsters in 1973?

A Contracts expires—

MR. KILKENNY: May I again object on the basis that the question lacks necessary foundation with respect to what growers and in what crops.

JUDGE MUECKE: Well perhaps if it is not relevant because it is not specific, presumably it won't be relevant if we consider it, and if you wish to flesh out the details I guess you can do that on cross-examination.

Go ahead, please.

Q (By Mr. Rutkowski) Did some of the grape growers sign contracts with the Teamsters in 1973?

A Most—with the exception of one grower, of over a hundred contracts, only one signed—resigned with us. All of the other growers, most of the others signed with the Teamsters. Our contracts expired on midnight of April 15, 1973, and there was an announcement at 9:00 o'clock in the morning on the 16th of April that they had signed with the Teamsters in Coachella.

JUDGE MUECKE: How many contracts were involved?

THE WITNESS: In the Coachella there were about forty contracts involved and then other areas, as the contracts came to termination the same thing happened.

Q During this period when the Teamsters signed contracts with the growers was there any vehicle for any secret ballot elections to be held to determine which union of workers wanted to represent them?

A Well, it was the same because there was no law then. There was the same vehicle that we used in 1970 when the employers agreed to a form of election and when in many cases the Federal Mediation Service came—Federal Mediation Conciliation Service came in and conducted those elections. It amounted to an agreement made between us and the employers, that if the workers accepted the contracts they would also be accepting voting to be recognized by the Union.

JUDGE MUECKE: When you say Concilation Service are you talking about the Federal?

THE WITNESS: The Federal, yes.

JUDGE MUECKE: On what basis did they participate in these elections?

THE WITNESS: They came in to supervise the voting of the ratification of those contracts.

JUDGE MUECKE: I mean, was that by agreement between the employers and the Union?

THE WITNESS: Oh certainly, yes, approximately both employers and the Union, and that was [67] the pattern established for all the industry in fresh grapes. In some cases, the State Conciliation Service of California. In some cases a Committee of clergymen. And in other cases the Conciliation Service.

Q Did the growers—excuse me, go ahead.

A The Federal Concilation Service.

Q Did the growers who signed contracts with Teamsters in 1973 agree to these elections by third parties?

JUDGE MUECKE: You mean supervision by third parties.

Q Supervision of these elections by these third parties.

A In 1970?

Q Yes, but in 1973.

A Oh, no. When it was announced on the 16th day of April at 9:00 o'clock in the morning that they had signed with the Teamsters we objected strenuously, stating, how can you sign with the Teamsters when they don't even represent the workers.

And of course they said, well, we have petitions the workers have signed.

We challenged them; we said let's have elections, we had them before, let's have them again. I proposed that we would abide by any third party to conduct the [68
elections they wanted to. We would abide by any one they chose. The growers refused, of course, and the Teamsters refused.

Q After the Union and yourself, the workers, became aware of the problems that were created by not having this election process, did the Union undertake anything, any activity in regard to establishing a legislative policy regarding elections in agriculture?

A It was a tremendous shock to us to see that the work that we had and the gains that we had made with the five years, the boycott and strikes, would be down the drain because the employer made a deal with the Teamsters, so we immediately began to press for legislation that would permit the workers to vote in secret ballot elections to determine representation.

Q Did you yourself participate in discussions or drafting of such legislation in 1973?

A With our attorneys we—I more than anybody else supplied much of the information. I took a special interet. Our legal department drafted our original bill

and I collected information from the staff and from other knowledgeable sources and then I was also involved very directly with it, yes.

Q With what persons did you consult or discuss in regard to the proposal of labor legislation for the field of agriculture?

MR. KILKENNY: We are speaking of what [69
state now, counsel?

MR. RUTKOWSKI: California, Your Honor.

A In the proposal for legislation in California first the legal department with the membership of the Union, with the leadership of the Union, and then we consulted with a number of Unions, the AF of L CIO, the United Auto Workers Union, and a number of other Unions involving the National Labor Relations Act. Then we consulted with University professors. We consulted with people who have been active in organizing workers in years past and others. I forget; there were many, many people.

Q When you say "we" were you personally involved in these consultations?

A In some cases and in others not.

Q With what persons did you yourself personally consult over this type of legislation?

A Well, with membership. With the leadership of the Union, with the legal department, and in some cases we would, if time permitted we would drop in on discussions when these people would come around.

Q As a result of these discussions and so forth was a proposal regarding legislation made by the United Farm Workers?

A Yes.

Q And when was that proposal made?

A The proposal was made in 1974 in, I believe, the beginning of the session in California.

Q In regard to consideration of that legislation did you participate in any legislative hearings?

A I participated, yes, in some hearings.

Q Did you testify before any hearings?

A Yes, I did.

Q On how many occasions?

A Two or three occasions.

Q In your discussion with the Union Board, the legal staff, the ranch committees, I believe you mentioned, what were the major concerns that you, the workers or attorneys, had in regard to labor relations legislation in the field of agriculture?

A Well, that it would be—we didn't want the repetition of what had happened in the fresh grapes industry to take place. We wanted to make sure that secret ballot elections would be mandatory as a step to getting recognition. We wanted to make sure that the majority of the workers would be having a chance to decide the question of representation.

Those were overriding factors. Those were the things we were extremely concerned with.

Q In what specific ways did you believe that a law would assure the majority of workers could participate in the elections? [71]

A We felt that to accomplish that it would have to be a time limit between the time the petition was presented for the election and the time the election was held and that nothing should interfere with the calling off of the election and that complaints and hearings and other matters, issues that arose during the organizing or during the actual election, could be handled after the election.

Q Were there any other concerns of the Union expressed in its proposal for legislation other than the timeliness of the elections?

A Well the timeliness was one of the concerns. There were others. The question of the unit was extremely important because we had seen in agriculture that there was a number of cases where the minority group workers was not getting what we call the prime jobs and that they were relegated in many cases to the stoop labor positions. We did not want to separate those units where one unit would be composed of entirely the stoop labor operations and the general labor operations and other unions be composed of some of the other better jobs, so one of the arguments was to create one unit for the whole ranch, because of what we called in those times the creating of economic ghettos relegating minority group people to the [72] shorthandled hoe and stoop labor jobs. And that if there were more than one unit, then the probability of having more than one union would be involved and

then the workers would not be able to be promoted on to the better jobs like truck driving and irrigation and such jobs.

Q After this law was proposed were you personally aware of the process of advocating this law before the legislature and with other interests involved?

A I don't understand.

Q Were you aware of the steps the Union was taking to have this legislation passed?

A Oh, yes.

Q Generally, tell us how, in what fashion the law was eventually adopted.

A Well, we first selected a sponsor and then we submitted to what is called the legislative analyst in California, and they made a prediction of the cost and also what is in conflict with other laws and whether it is unconstitutional or not, and then we went and got the support of other legislators and we got support of the Governor and then began the process that was introduced, the hearings were held, and it went through the various processes.

Q During this process was there any interrelationship between the Union and agricultural interests that were concerned about this legislation?

A Well, there were other interests that were against the legislation, or parts of legislation. There was a lot of opposing testimony at these hearings.

It came to a point where we couldn't get the law in 1974 so we tried again in 1975.

Q And was the law passed in 1975?

A Yes, but it was a compromise bill because again it hit a snag or it couldn't go any further because the agriculture interests were against it. And so with the intervention of the Governor—he called both the Unions and the employers, and we agreed to a compromise bill and once the agreement was made it was very quickly adopted by the State Legislature.

Q You say the bill was passed in 1975. Was a compromise measure agreed to between the Union and agricultural interests?

A Yes. The most—I think all of the major agricultural associations, organizations in California and the Teamsters Union and our Union and AF of L CIO Union agreed to it.

JUDGE MUECKE: What does this line of testimony go to in this case?

MR. RUTKOWSKI: Your Honors, that was actually the end of that line. I was going to ask Mr. Chavez what were the major provisions of that law in regard to legislation, and the line of testimony up to this point was to give some indication that it had been agreed upon by interests other than just the Union. [74]

JUDGE MUECKE: All right.

Q (By Mr. Rutkowski) Mr. Chavez, are you aware of the provisions of the California law that was adopted in 1975 in regard to conducting of secret ballot elections for agricultural workers?

A Yes.

Q Could you just very briefly tell us what are some of the major provisions of that law in regard to conducting elections in regard to how they affect the organizing of farm workers in the agricultural industry?

A Yes.

MR. KYL: Excuse me, may I interpose an objection here, please, Your Honor, as to how the California Act may work in California I really fail to see as relevant to how the Arizona law is working in Arizona.

JUDGE MUECKE: What is the relevancy as you see it?

MR. RUTKOWSKI: Your Honor, Mr. Chavez has earlier testified that one of the major provisions of such an Act would be timeliness of elections. I believe this question will give some indication of how that problem could be handled and actually was handled in this sort of legislation. I think later we will be able to show that these same protections are not present in the Arizona Statute.

(Brief suspension of proceedings)

JUDGE MUECKE: You may go ahead. I think, though, that the objective of whatever you do presumably is based on the fact that you are presenting Mr. Chavez as an expert in his field. I don't know that just presenting comparison of two laws will do it unless the comparison in and of itself in his opinion—in a sense, I suppose you are trying to do a Brandeis brief thing here and flesh out the words of the law here with the

impact or significance they have in actual operation based upon the opinion of an expert. Is that what you are trying to do?

MR. RUTKOWSKI: In some regard, Your Honor.

JUDGE MUECKE: But all these essentially have to relate to a Constitutional question, you appreciate that.

MR. RUTKOWSKI: Yes, I do, Your Honor.

JUDGE MUECKE: So go ahead, if you do it on that basis.

MR. KYL: May I voir dire the witness for one question.

JUDGE MUECKE: Yes.

MR. KYL: Mr. Chavez, do you consider yourself [76] an expert in interpreting the Arizona Employment Regulations Act?

THE WITNESS: I am not an attorney—in terms of interpreting the law, its legal contents, no. But in terms of dealing with the practical applications I think I can be an expert, yes.

JUDGE MUECKE: I don't think that we are interested nor do I think this witness is being offered as a constitutional expert. I think he is being offered as he has just expressed his view, on the practical effect based upon his experience and his opinions and to that extent we are willing to hear it.

What did you wish to say?

MR. KYL: Well, Your Honor, I believe the witness has previously testified that he does not consider himself to be competent to testify as an expert with respect to the interpretation of the Arizona Act, as to how it operates, and these questions go to how the California Act operates. Perhaps he is an expert on that, I don't know, but—

JUDGE MUECKE: Well, I have indicated to you what I think is relevant, and if his testimony doesn't fulfill that objective then of course it will be irrelevant and we will disregard it. Go ahead.

Q (By Mr. Rutkowski) Mr. Chavez, in regard to the actual operation of the California Statute in organizing elections for farm workers, would you just briefly tell us what you think are the major provisions of the California Farm Labor legislation regarding elections?

A Well, you have to qualify for the petition for an election which is fifty per cent of the work force signing authorization cards, and then the election is held and you have to get the majority of people voting for the Union.

Q In regard to the practical operation of that law, in assuring some timely election, are there any provisions that you consider significant?

A The most significant provision is the time limit, that after the petition is presented an election has to be conducted within seven days, and that is the protection so that the majority of the workers will be able to vote, and the other one is that there has to be—that the election has to be conducted during the peak season. That is where fifty per cent or more of the total number of employees are actually working when the election takes place.

Q Are you saying the election can be held only at the peak times?

A Yes.

JUDGE CRAIG: When you refer to peak season you are talking about the peak of the harvest season? [78]

THE WITNESS: The peak of whatever—in the most cases it is the harvest season; in some cases it is the pre-harvest season.

JUDGE MUECKE: It is when the majority of the employees are employed?

THE WITNESS: Correct.

JUDGE MUECKE: Are going to be employed during that particular period?

THE WITNESS: That is correct.

JUDGE MUECKE: You have expressed an opinion on these being the most significant provisions. Are you going to go on to have his opinion as to why that is so?

MR. RUTKOWSKI: I believe at some later point, Your Honor, yes. This is primarily foundation.

JUDGE MUECKE: All right.

Q (By Mr. Rutkowski) In regard to the experience of your Union, United Farm Workers of America, in operating under this law in the last year or so, Mr. Chavez, has this law had an effect on the ability of your Union to organize farm workers in California?

A A tremendous effect. It has made organizing legal for one and it has given workers a protection to be recognized through a procedure by the State and the impact is being considerable.

Q Do you know how many elections have been held under that law?

A In the first five months of the law in operation from September 1975 through the end of January, '76, over 400 elections were held.

Q And how many workers were involved in these elections?

A Approximately 40,000 workers voted.

Q And how many of these elections did the United Farm Workers participate in?

A We participated in almost all of them. Ninety-nine per cent of them we were participants in.

JUDGE MUECKE: I am sorry, how many elections were held?

THE WITNESS: Over four hundred.

Q (By Mr. Rutkowski) As a result of these elections has your Union been able to negotiate more collective bargaining agreements since the passage of this Act?

A More—many more agreements, and we are in the process of negotiating even more agreements. There is a tremendous amount of difference between the outlook of the employer and the Union toward adjusting their differences in terms of the Labor Relations in agriculture.

Q Mr. Chavez, during the period that you just described to us, have you ever had occasion to testify before any governmental bodies on conditions of farm workers or organizing agriculture employees? [80]

A Yes, I have.

Q Limiting it now to Governmental bodies or agencies, before how many of these have you testified since you began organizing the United Farm Workers Union?

A We testified before the U.S. Senate Committee on Agricultural Labor a couple of times, we testified before some of the House Committees. We testified in California in the Assembly, the State Senate.

Q Are there any other Governmental bodies that you have testified before?

A Before Commissions, before investigating committees. Both the Federal Congress and State Congress, yes, numerous occasions.

Q Were you invited to testify at these hearings?

A In most cases, yes.

Q But when you say "when we testified" are you referring to yourself personally, that you personally testified?

A Yes.

Q And in what capacity did you testify before these committees?

A I testified as the President of the Union and as an expert in this field. [81]

Q During approximately the same period since 1965 to the present have you been invited to lecture before any groups or bodies on farm workers, conditions of agriculture in this country, organizing the farm workers, labor relations matters?

A Yes, many, many.

Q Could you give us some approximate number of how many groups or schools that you have testified before?

A Hundreds. I don't know exactly. Very many.

Q Could you give us some brief examples of groups that you have testified before or spoken to regarding farm labor?

A Universities. Before legislative bodies of other countries. Before religious assemblies. Before professional groups. Before civic groups. It is a whole variety of groups in the country.

Q You mentioned universities that you have spoken at. Could you please just give us the names of some of the universities that you have lectured at.

A Most of the universities in California. Harvard. Yale. Columbia. City College in New York. Michigan State University. Ohio. Just many, many.

Q I take it you would lecture just in regard to farm labor in this area?

A Farm labor, the conditions on farm work and the Union and its program.

Q You mentioned you testified before a legislative body of some other countries. Could you please list those?

A Yes. We testified before a group of Canadian congressmen. They are members of Parliament. We testified in Norway before a Committee, testified in Sweden, met with some members of Parliament in London, talked to some people in Mexico.

Q You mentioned you also have spoken before some civic groups. Could you give us just a general idea of what some of those specific ones were.

A Civic and political groups. Democratic clubs. Before civic groups representing minority groups, the NAACP and similar groups.

Q You also testified, Mr. Chavez, that you had appeared and spoken before some religious bodies. Could you give us a few of those that you have testified before.

JUDGE MUECKE: Is there some reason? Is there going to be a challenge to this witness as to his experteses in this field?

MR. KYL: In what field, Your Honor? Testifying before universities?

JUDGE MUECKE: No. Please.

MR. KYL: Well, no. I don't know what questions he is going to be asking.

JUDGE MUECKE: Perhaps if we have witty remarks we could do it up here. But can you limit what you are asking him to experteses in the field of agricultural labor and the laws pertaining thereto. That is what we are here for.

MR. KYL: We certainly will not deny the fact that Mr. Chavez can testify to a great deal of things that he has observed and maybe in some areas as an expert. Beyond that, it will have to depend upon what questions are asked.

JUDGE MUECKE: All right, but I mean, do you feel enough foundation has been laid—I know you are not going to agree he is a legal scholar and we don't feel he is either and have already expressed that opinion. But in terms of his knowledge of the field, based on what he has testified to so far, do you wish this to continue?

MR. KYL: I have no objection to this line of questioning continuing because I probably will object to his ability to express certain kinds of opinions.

JUDGE MUECKE: All right.

MR. RUTKOWSKY: Your Honor, I actually only have two more questions in regard to this. I think we could perhaps end.

JUDGE MUECKE: Go ahead, then. [84]

Q (By Mr. Rutkowski) Mr. Chavez, you testified you have appeared before various religious bodies, testified about farm workers. Could you please tell us what some of those were.

A Before national conventions of some of the church denominations in the United States. Before pre-senates and sister organizations. Before the House of Bishops of the Episcopal Church. Before the Commission on Peace and Justice in Rome. The Worldwide Commission from the Papal Commission. Before just local church groups.

Q Have you had an occasion during this period to also write any articles or other pieces regarding agricultural labor and specific problems in that field?

A From time to time newspapers have asked that I write articles on the subject and I have written some, yes.

Q And could you just briefly quickly give us an idea what some publications you have written in—such articles in.

A In California, one of the leading San Gabriel newspapers, the Los Angeles Times, I believe one of the San Francisco newspapers, the Chronicle, and some of the newspapers—the Sacramento Bee, the Fresno Bee, the Long Beach Daily, and a few others.

MR. RUTKOWSKI: We have no further questions in regard to this area.

THE COURT: We will take a recess until 1:30.

(Noon recess)

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AFTERNOON SESSION [86]

* * * *

JUDGE MUECKE: Go ahead, please.

Q (By Mr. Rutkowski) Mr. Chavez, you testified earlier this morning that the United Farm Workers and you yourself personally were involved in proposing and lobbying for labor relations in agriculture in California, is that correct?

A Yes.

Q And does that legislation provide for secret ballot elections for agricultural employees?

A Yes, it does.

Q And you have already testified that your Union has already participated in over 400 of those elections, is that correct.

A That is correct.

Q Just very generally, would you tell us, please, what are the esstential stages, under the California Department of Legislation, by which a union practically obtains recognition under that law.

A Well, first of all a petition for an election has to be filed and all the work that goes with it to obtain the signatures for the petition. An election is held, and then if a union wins the election the Board will certify the union as the collective bargaining agent.

Q Now these four hundred elections in California, during what part of the season were they held?

A They were held—under California law they must be held at the peak season. That means when at least fifty per cent of the majority of the workers are working, fifty per cent or more, the election can only be held during that time.

Q In regard to the participation of your union in these four hundred some elections, could you please tell us what has been your personal responsibility in regard to those elections?

A The supervision and the administration of the campaigns and the work that goes with it in terms of the programs and the dealing with the organizing, with the budgetary matters, with the staff assignments, dealing with the legal questions that come up, the legal department and so forth.

Q As part of the administration and supervision of these election campaigns and these four hundred elections, are you personally aware of various procedures that were necessary for organizers working, actually working, with farm workers to perform?

A Yes.

Q Now through what process did you receive information of these procedures or become aware of what was taking place in the field in preparing for these elections? [88]

A Well, I was personally involved in some of the organizing for the pre-petition work and then, of course, through the administration of the work that I do in that connection. So that I have a very good knowledge of what is entailed during that period.

Q And by what means do you receive information from your staff in regard to organizing these elections?

A In constant various ways at meetings, via telephone, in on the spot meetings in areas where they are organizing. It comes through conferences to deal more effectively and more efficiently with the campaign to organize the workers.

Q And what has been the purpose of your obtaining this sort of information from your staff about organizing these elections?

A Well, the purpose is to be able to—I have to make decisions. I have to set policies. I have to go to Executive Boards of the Union and ask for policy decisions where such policy is lacking. So I need information to make decisions, basically.

Q As a result of the meetings eventually you had with your staff and your personal involvement in some of the pre-petition campaigns, I believe you mentioned constant telephone contact with your staff in the field [89] and these means of keeping abreast of what was going on in the elections.

Do you have knowledge of how long it has taken the United Farm Workers to prepare to petition in pursuit of a valid election under the California Act?

A Generally from the time that we start the organizing drive and gathering the petitions until such time that we have enough in our opinion to be able to win an election. That is between three and six weeks.

Q This three to six week period is from—up until the time petitions are filed, is that correct?

A That is right.

Q What are some of the activities, procedures that union staff must perform during this period to enable them to qualify for an election?

A There are a number of functions that have to be performed. You have to find out where the employer is, find out if he started working, find out where he is going to be at peak period in that activity, find out if he has more than one location, find out about the various job classifications and where the people work and who they are and where they live.

You have to go through what we call an educational period to get the workers to answer all the questions. There is the element of fear that is almost [90] always present. You have to overcome that and get the cards signed, and then you have to go into the issues that the workers have, find out what other things they are mostly dissatisfied with, what are the strong points and the weak points in organizing that ranch.

There is a number of things that have to be dealt with.

Q Is it true that each of the steps you just listed were steps that had to be accomplished prior to petitioning for the election?

A Well, before we can get enough cards—and by this I don't mean enough cards by the regulation of the law—but enough cards so that we are pretty sure we are going to win the election when we go into the election.

We need to do all those functions to be able to get enough signatures and be able to educate the worker and deal with his fear, explain the protection under the law so that it takes all of that work.

* * *

Q (By Mr. Rutkowski) I would like to direct your attention to a couple of the items that you just listed in terms—you mentioned that you had to learn who the employer was and where the ranches are located. Could you please give us some idea from your experience as to just what specific problems are involved in doing that.

A One of the problems is that, as you may know, the ownership in land in California, or at least the business of farming, changes hands very rapidly, and so when we think we are organizing a particular company we were sure was harvesting that particular plot of land, turns out it is a different company now. By that I mean we have to be sure that we have the right company. Otherwise we will have the wrong name on the petition.

Also, sometimes they will farm two different ranches in the same locality—not contiguous but the same locality. So we have to find out how many ranch operations they have and we have to locate them. We have to try to find out as much as we can ahead of time where they are going to be working which particular day so we can find them. Trying to find a ranch in Delano, a grape ranch, if you don't know the area or it is a new employer and if they have more than one ranch or they change the crew and you miss that change, it will take you all day to find it, because we

are dealing with hundreds of square miles of vineyards.

Q You also mentioned there are problems involved in determining who the workers are for a particular employer and where they live. Could you give some idea what are the specific problems involved in this process?

A Yes. Well, that also goes to who is farming, who owns the operation at that time, because there is a lot of leasing going on. Also, we need to find out who the workers are so that we can visit them at home. We have to have a good idea of what their job classification—whether they are irrigators or truck drivers or lettuce harvesters, for example, to be able to deal with the specific problems they may have.

Q Another fact you mentioned was a period of I believe you said educating workers and preparing them for possible retaliation from the employer. Just what time elements are involved when you are preparing for an election that relates to these matters. [93]

A Our experience is that we get a certain amount of cards very quickly and then—but not anywhere near enough to qualify or win the election.

After that, then, to get the rest of the cards we have to deal with the workers' fear in many cases, his uncertainty about the law to what extent he is protected, so in order to get the remainder of the cards and be reasonably sure they will vote for the Union we need to then go into a lot of education about their rights under the law and that if they are—most often they now know that a friend of theirs or a relative or someone that they know was fired because of Union

activity. They are very worried about that, so we have to reassure them that there are these rights under the law and that there is nothing to be worried about.

* * *

Q (By Mr. Rutkowski) Mr. Chavez, you told us [96]
that this pre-petition activity averaged about three to six weeks in California. Just briefly tell us what factors, if any, in your experience there have been that would either cause that to be longer or shorter within that period.

A We just talked about the employers' attitude toward the union. If it is a good attitude and he is willing to not interfere with the process, it goes very quickly and if he does interefere it takes more time.

* * *

Q (By Mr. Rutkowski) Mr. Chavez, referring now [10
to Section 23-389, which is on Page 15, Line 9, the [10
copy of the law—

JUDGE MUECKE: Page 15 Line 9?

MR. RUTKOWSKI: Yes—provided to the Court, the section entitled "Representatives and Elections".

JUDGE MUECKE: It might be a good idea if you had one of those laws marked so that the record would always reflect what exhibit we are talking about, because I would think there would be an appeal whichever way this case goes, and the record ought to show what we are talking about.

THE CLERK: We have this marked as Plaintiff's Exhibit No. 2 for identification.

JUDGE MUECKE: All right. Is there any objection to having it in evidence?

MR. KYL: No, Your Honor. If that is a correct copy of the Act, we have no objection.

JUDGE MUECKE: I assume it is.

MR.KYLE: It certainly appears to be.

JUDGE MUECKE: It may be in evidence then, Plaintiff's 2, and it is there for reference that either side can use so that we will know for the record what we are talking about.

Q (By Mr. Rutkowski) Mr. Chavez, this section is entitled "Representatives and Elections." I would like [106]
to direct your attention, if I may, to Page 16, Line 1, Section C.

JUDGE KILKENNY: Section C?

MR. RUTKOWSKI: Section C-1, Your Honor.

THE WITNESS: Yes.

Q (By Mr. Rutkowski) Have you read the entire Section—Section 1 also?

A I am sorry?

JUDGE MUECKE: It seems to me there are two ways to approach this. One is to have the witness react to language of the Statute. The other one is, keeping in mind what you want to prove by the facts that are admitted in terms of the legal effect of those facts, would be to have him testify about what in his experience is a requirement from his view and background and all the rest in order to have a union—a group of

people exercise such rights as amount to a constitutional question, and then you would argue from his testimony as to the legal effects of his testimony as would the defendants, and I would assume that is the direction which you are trying to go.

Do you follow what I have said?

MR. RUTKOWSKI: Not entirely, Your Honor.

JUDGE MUECKE: Well, you are here today and the next four days to have your witnesses and your evidence show that the effect of this Act is such as to violate various Constitutional rights so if you are going to have the witness testify, his testimony ought to be evidence from his point of view, his background, his experience, which would be relevant to what you are trying to do, to show how this Act frustrates Constitutional rights.

MR. RUTKOWSKI: I understand.

JUDGE MUECKE: So however you do it that is the direction you have got to go if you are to make your case.

JUDGE KILKENNY: What particular language in C-1 are you pointing to, counsel?

MR. RUTKOWSKI: That language which says that a petition—

JUDGE KILKENNY: What line?

MR. RUTKOWSKI: Line 7—7 and 8, particularly 8. ". . .Thirty per cent or more of the number of agricultural employees in the unit in question either wish to be represented—"

JUDGE KILKENNY: All right.

Q (By Mr. Rutkowski) Mr. Chavez, have you had a chance to read Section C-1?

A Yes.

Q In regard to your understanding of that language as to how it affects the practical procedures of organizing farm workers for an election under this piece of legislation, how does that compare to the experience you just testified about under the California Act? [108]

MR. KYL: Excuse me, Your Honor.

I must interpose an objection based upon foundation and also based upon conjecture and speculation. There has been no indication that the witness is familiar with organizing under this Act in Arizona. In fact he has specifically responded to one of the Court's questions that he has no familiarity with organizing in Arizona under this Act, so the comparison could not possibly be made other than being based on pure speculation.

JUDGE KILKENNY: Couldn't he compare the two statutes, counsel, with this background that he has here?

Of course, we are supposed to compare it, too, and our comparison will ultimately count. But we seek expert opinions on a good many things, even on questions of law; it is permissible. Particularly the law of another State, as to how it might affect us, how it might be compared.

So wouldn't you think that in this case, with all that we have before us now—whether it is relevant or not may be another question—but with all we have [10
before us now don't you think we should have some comparison between California and Arizona?

MR. KYL: With all due respect, Your Honor, I disagree, and I will tell you why, and this is critical to the whole case so I do think it deserves a minute here.

The witness has testified about his experiences in California and how the California law has worked. But what is critically missing from his ability to express an expert opinion about Arizona is any experience organizing under Arizona, under this law. There is none. And furthermore there are significant differences between what is necessary to accomplish organization in Arizona and what is necessary to accomplish organization in California, and there has been no foundation indicating that the experience is the same or where the differences are.

JUDGE KILKENNY: Well, he did testify early in his testimony that he thought the two states, that the problem in the two states—I don't think he said were identical but were generally the same, or something like that.

JUDGE MUECKE: I don't think we know the precise matter to which he is responding. Now we just know that he is responding to C-1. If we would have a [10
more precise question, if you would pluck out of C-1 what it is you want him to answer, then we would know what he is giving an opinion on as opposed to giving a legal opinion.

"For example," you could say. Then they would know whether or not they believe you are stating the question correctly, based upon the Statute itself, and we would know how to rule on it. Do you follow me?

MR. RUTKOWSKI: Yes, Your Honor.

JUDGE MUECKE: In other words, you are the lawyer, you going to say to him, This law provides for so and so. In your experience what effect does this have, and so on and so forth.

Do you follow me now?

MR. RUTKOWSKI: Yes, I do.

JUDGE MUECKE: I think if you do that we will be all right.

Q (By Mr. Rutkowski) Mr. Chavez, referring to Page 16 Line 8, that section which says that a petition shall include thirty per cent or more of the number of agricultural employees in Arizona. Does this requirement in Arizona have the same practical effect that the qualification provisions of the California Act which you have already testified about have?

A It would have, in my opinion, the same practical [111]
effect, yes.

JUDGE KILKENNY: And again now, what would you call a similar or a like provision in the California Statute? Is there a provision as to thirty per cent or—

THE WITNESS: Fifty per cent, Your Honor.

JUDGE KILKENNY: What?

THE WITNESS: Fifty per cent.

JUDGE KILKENNY: Fifty per cent?

THE WITNESS: Yes, in California.

* * *

Q (By Mr. Rutkowski) Mr. Chavez, you testified that the Arizona Act requires a thirty per cent showing of interest, is that correct?

A Yes.

Q Now in terms of factual basis of how you and your Union would — what you would have to do to obtain authorization cards from thirty per cent of workers, would the steps you would take in that process be the same as the ones you described under the California Act?

A I think they would be pretty much the same, yes.

Q And would you please tell us what steps — and based upon your experience in over 400 of these elections, in obtaining a percentage of authorization cards for a showing of interest — what practical steps your labor organization would have to take to obtain this thirty per cent?

JUDGE MUECKE: Isn't that what he has already testified to?

THE WITNESS: Yes, pretty much what I testified to.

JUDGE CRAIG: It is the same, isn't it, except you only have to have thirty per cent in Arizona where you have to do fifty per cent in California. So your job is increased by twenty per cent in California, is that right?

THE WITNESS: I need to get a clarification of the question. Thirty per cent to qualify for an election but not thirty per cent to organize workers. They are two different things.

JUDGE MUECKE: You testified previously it takes three to six weeks, and that is the time period you are referring to to get ready to get the petitions from the time you start.

THE WITNESS: Your Honor, I said to be able to win an election.

JUDGE MUECKE: Well, is that the answer you are giving him now?

THE WITNESS: He is asking me, I think, how long does it take to get thirty per cent, which is different than what it takes to win an election. I am trying to clarify that.

JUDGE CRAIG: Maybe you would have to get over fifty per cent to win the election; right?

THE WITNESS: Well, we in California say, we don't like to come with less than eighty to ninety per cent. Otherwise we are wasting everybody's time and money.

JUDGE MUECKE: I thought you said before, even though it is fifty per cent on the petitions in California you do the three to six weeks because you don't want just fifty per cent, you want enough by the time you present the petitions to win the election.

THE WITNESS: We would need eighty in either case. If we were organizing in Arizona under the law, we would come in with eighty — possibly ninety per cent to make sure we would win or have a good chance to win.

JUDGE CRAIG: So whether it says thirty or fifty really doesn't make any difference with respect to your problem; right?

THE WITNESS: That is correct.

Q (By Mr. Rutkowski) I am not entirely sure what the record reflects in regard to this, so I am going to ask this:

In regard to this requirement, Mr. Chavez, based upon your experience in California, in organizing Arizona farm workers in your opinion how long did it take under this provision in the Arizona Act referred to to obtain the number of authorizations you would normally obtain before petitioning for an election? [118]

MR. KYL: Excuse me. Again that is the same question and I have the same objection; how long does it take.

JUDGE MUECKE: No, it isn't. He is doing it on his experience and he stated — as Judge Kilkenny told you a moment ago — the conditions are pretty much the same not only in Arizona but in California and Arizona. So overruled.

JUDGE CRAIG: But I think you ought to tell us what the variables are. What he wants is eighty per cent of five thousand workers where over here it might be a thousand workers. I doubt if there would be that many in any ranch in Arizona, but maybe 300. So if it

takes him three to six weeks in California to get eighty per cent and he has only got a hundred people or three hundred people to work with in Arizona on a given unit, it is going to take him a lot less time.

MR. RUTKOWSKI: I understand that, Your Honor. I was going to get into some of the variables. I am sure Mr. Kyl will raise some of them on cross-examination, and I believe by the time we finish we should have a very good idea of just what practical problems are involved in this Act as well as the California Act.

JUDGE CRAIG: Why don't you ask him what the variables are that he is confronted with in responding to your question? He can't on that bare bones question tell you it is going to be three to six weeks or six to eight weeks or what it is, because he doesn't know what the problem is. [119]

Q (By Mr. Rutkowski) Mr. Chavez, does the fact that the Arizona law requires but thirty per cent to petition for such election while the California law requires fifty per cent alter your opinion as to how long it would take in terms of an average time to organize farm workers to participate in the election, to petition for an election?

A. No.

Q And why is that?

A Because our union is not just satisfied with qualifying for an election; we want to win an election. It is too costly to get involved in the election with not enough organization done, not enough commitment from the workers to be able to have a reasonable chance of succeeding. If you come in with a lesser

amount — if we came with thirty per cent of the workers — chances are we would never win the election either here or in California, but the consequences and the expense and the time involved in litigating whatever disputes would arise as the result of the election would be the same.

* * *

Q (By Mr. Rutkowski) Mr. Chavez, when does the gathering, the collection of these authorizations from workers take place at a particular agricultural employer?

A We try very hard to begin at the point that the employer begins his operations, which is going to yield the peak season, the peak amount of workers, and we need to start as quickly as we can taking in consideration all the work that must be done, because otherwise we find out if we don't do that then we won't have enough time to hold the election because the season will pass and we won't be able to qualify in that period.

* * *

JUDGE CRAIG: Does your experience allow you to have an opinion on whether your Union is entirely unique in this respect as compared to other unions and AF of L CIO, for example?

THE WITNESS: We have talked to many, many unions in the last fifteen years and from our conversation with them I would say that we are unique, yes,

not only in seasonality of employment but intermittent employment within that season and then the migrancy factor added to that.

* * *

Q (By Mr. Rutkowski) Mr. Chavez, in your experience in California does that law, administration of that law provide for access of union staff members into the field to talk with agricultural employees? [126]

A Yes, it does. It has many restrictions but it does provide some time with which we can speak to the employees.

Q I would like to ask your opinion now, assuming you had to organize, take the same steps to collect the petitions, the authorization signatures that you testified in California but were denied access into the field to talk to workers while they were in the field, based upon your experience what is your opinion as to how that would affect the time period to gather these authorization signatures.

A Well, it would take longer because of mainly two reasons, One is that we could talk to all the employees at lunch while they are together. If we don't have the access rule then we would go to find out where they live, visit them individually. The other thing that it takes less time is because if we can go into a field when the workers are eating and not interfere with the production or with any of the crops and on a limited basis talk to them while they are eating lunch, it tells the workers that it is okay, it gives a legitimacy to the work we are doing, that it is okay to organize them,

that it is not against the law. Those two factors tend to [127]
make the organizing shorter where you have the access.

Q In the 400 some elections in California have there been experiences where agricultural employers denied access to union personnel despite the provisions of the law?

MR. KYL: Excuse me, if I may I really should object to the last question as being irrelevant because there is no indication of what the situation in Arizona is. This is all about California.

JUDGE MUECKE: I think if you are going to have his opinions on the effect or what needs to be done to have meaning it should relate to the particular Statute here.

MR. RUTKOWSKI: That is why I asked the hypothetical question, because I believe it would be an area where there is a mixed issue of fact involved, because I believe at a later point in oral arguments then we would argue the Arizona Act in regard to whether or not it does provide access.

JUDGE MUECKE: Well, are you saying that there is no provision in the Arizona law that decides the access matter one way or the other? I mean if there is a provision in the law —

MR. KYL: Excuse me. First of all, in California it is not in the law.

JUDGE MUECKE: I am asking about Arizona law.

MR. KYL: In Arizona there is nothing in the regulation or law that would prevent access to field workers, as far as I know.

MR. RUTKOWSKI: That is one of the specific legal issues we have alleged, that the Act does in fact deny access.

JUDGE MUECKE: Is there a provision in the Statute governing access? That is what I asked. Is there?

MR. RUTKOWSKI: Yes, Your Honor.

JUDGE MUECKE: What provision is there, do you know?

MR. McCRORY: Page 10 Line 6 through 12.

JUDGE CRAIG: What is it?

MR. RUTKOWSKI: Page 10 Line 6 to 12, Your Honor.

(Temporary suspension of proceedings)

JUDGE MUECKE: Generally given trespass laws — I think that would effectively take care of the matter, unless there were law to the contrary. Go ahead. Your objection is overruled.

MR. KYLE: My objection is this: that denying [129]
facilities is not the same thing as denying access. I don't think there is any experience in Arizona in point.

JUDGE MUECKE: There certainly is. I had a case on it in which I believe some of the members of the organization argued that they could not have access to the place where the employees lived on the land of the employer because it was private property, and I held they could because it had a quasi public use

and there was no appeal on it but that very issue was presented and it was argued on that basis. So I don't see why it doesn't affect that and if it doesn't, then we will let you argue that in the legal briefs. But you are overruled at the moment. Go ahead.

THE WITNESS: Yes. There has been occasions where we have been denied access to the workers during lunch periods.

Q (By Mr. Rutkowski) From your experience in these elections based upon your opinion and your experience, what amount of time has this added to the period required to obtain authorizations for petition?

MR. KYL: Excuse me. Just to be clear. Is this California?

JUDGE MUECKE: It is based upon his experience concerning which we have heard a great deal of testimony.

MR. KYL: Objection on the ground of lack of foundation relating to Arizona. I really just want to know, is he talking about California.

JUDGE MUECKE: Overruled. He has already said the conditions are similar. We have been through this before.

Go ahead.

THE WITNESS: I am sorry. You have to repeat the question.

JUDGE CRAIG: I would like the question, too.

Q (By Mr. Rutkowski) Based upon your experience, where access was denied in these 400 elections do you have an opinion as to how much additional time this added to collect the necessary authorization petitions?

A It does require more time because then you have to talk to the employees one at a time and make the same presentation to each individual employee.

When you have the access you can make a presentation to groups of employees during the lunch period.

Q Again based on this experience do you have an opinion as to how much longer it has required?

MR. KYL: Objection. Hypothetical. Speculative.

JUDGE MUECKE: It probably would be better if you told us why it took more time and then give us an opinion.

THE WITNESS: It took longer because, as I said before, you know, if you go into the field and talk to workers during the lunch period you do two things. You are able to talk to groups of workers together. If you don't, then you have to talk to them individually at their homes so you can make only two or three home visits a night but you can talk to all the workers in one lunch break with the same information. [131]

The other thing is that if you go into the field and the employer is there and the supervisors are there and the Board agents happen to be there, the worker feels that it is a legitimate thing. We are not against the law. We are not trespassing. It is a legitimate thing. So therefore it has a beneficial effect in

terms of argument that the workers are less frightened to participate in the process.

JUDGE MUECKE: In terms of persuasion time, you mean?

THE WITNESS: Yes.

* * *

Q (By Mr. Rutkowski) Mr. Chavez, in regard to the election procedures of the Arizona Act, is there any requirement with that Act, that the election be held at the time of peak harvest?

A In California?

Q In Arizona.

THE WITNESS: Not to my knowledge. From the explanations I know about the law, there is no provision that an election must be held during the peak season.

JUDGE MUECKE: The thing you could do in a matter like this and with any other questions of this type, you could say: I will tell you, Mr. Chavez, that there is no provision in the Arizona law — for whatever it is — or there is a provision; now from your experience does this have an effect, and if so, what is it. Then we would avoid these problems where you get objections and then you would be asking a legal question that could be determined later as to whether it is appropriate or not. Do you follow what I am saying?

MR. RUTKOWSKI: Yes, I do.

JUDGE MUECKE: In other words, you can say to Mr. Chavez: There is no provision in the law for an election or time period or something of that sort; does this have an effect — something like that. I would think that would be the way to do most of this. Then we wouldn't be asking him for his legal opinion.

Q (By Mr. Rutkowski) Mr. Chavez, let me tell you that there is no requirement in the Arizona Act that the election be held at the time of peak harvest. Is that your understanding?

THE WITNESS: Yes. [134]

Q Just before I asked for your opinion regarding that — this is by means of foundation — in your lobbying and negotiating and consultation for legislation in California did the United Farm Workers take any position on whether or not such a provision should be in that legislation?

A Very definitely. Our position was that unless the election was held during the peak of the season that we would have a situation where the minority employed would be determining union representation or lack of that for the majority of the workers, and we argued strongly it should be during the time when the peak of employment is in effect.

* * *

Q (By Mr. Rutkowski) Assuming, Mr. Chavez, the [135]
Ariziona Act does not require election at peak of employment, in your opinion based on your experiences in California, your knowledge of agricultural operations in Arizona, your knowledge of farm workers in [136]
Arizona, what is the result of a law which provides for

elections without providing that they be held at a seasonal peak — peak employment?

JUDGE MUECKE: He has already answered the question — if you are going to object — he said the results is minority employment is voting. He already answered that. You didn't object when he answered it before.

Go on to the next question.

Isn't that correct, Mr. Chavez?

THE WITNESS: Yes, I did answer it.

Q (By Mr. Rutkowski) I will tell you that the Arizona Act has no time limit within which the election must be held after petition has been filed. Does that correspond with your understanding?

A Yes.

Q In your opinion, based on lobbying for legislation in California, the elections held in California, knowledge of farm workers in Arizona, what is the practical effect upon farm workers voting in valid elections if you do not have some time limit within which the election must be held?

Mr. KYL: I object to that on the ground it is purely hypothetical and conjectural, and would refer the Court to the stipulation which shows seasons, I believe, which run all the way from about eleven months down to two weeks.

JUDGE MUECKE: Why don't you take that into account in any question you are going to ask him.

We will take our recess.

(Brief recess.)

Q (By Mr. Rutkowski) Mr. Chavez, you testified this morning the California Act provided a seven-day period within which the election must be held after a petition was filed, is that correct?

A Yes.

Q I will tell you that the Arizona Act has no comparable provision requiring that the election must be held to have been a statutory period after the petition is filed. Do you understand that?

A Yes.

Q In your opinion the elections of California, your knowledge of farm workers, the seasonality of the industry that you testified about, and your experience in the elections that you have been involved in in California, what would be the result of organizing for an election under a Statute which does not have such, either a seven day or some statutory limitation?

Mr. KYL: Excuse me, I believe that was essentially the same question that was asked just before the recess and to which I objected. [138]

JUDGE MUECKE: Yes.

MR. KYL: I restate my objection.

JUDGE MUECKE: What was your objection?

MR. KYL: My objection is that the question is too general. It calls for speculation and conjecture and it is hypothetical.

JUDGE MUECKE: Why is it hypothetical? Is there something in the law that makes it hypothetical?

MR. KYL: There is something in the facts that make it hypothetical. It all depends whether you are talking about an eleven month season or a three or four week season, and all the variables in between.

JUDGE MUECKE: Take that into account if you pursue the issue. Other than that, it is overruled.

Incidentally, on any objections you may have had to relevancy of all this, you have previously made a record on that and the Court does acknowledge that. You don't have to continue making a continuing objection.

Go ahead.

Q (By Mr. Rutkowski) Do you remember the question, Mr. Chavez?

A No. Please restate it.

Q In your opinion, based on your knowledge of the agricultural industry, the seasonality of that industry, [13
what would be the result of a statute which did not have a statutory requirement either for a seven day or some statutory period within which the election had to be held?

MR. KYL: Excuse me, Your Honor. I thought in response to my objection you asked Mr. Rutkowski to make the question more specific.

JUDGE MUECKE: No, I said: develop it further. I assume he will.

Go ahead. Overruled. He will. Go ahead.

A In my opinion and from the experience that I had with California law, it would prevent many workers from voting because many of the crops, many of the practices in Arizona, the same as California, in terms of seasons and crops and so forth, so that if the election is not held quickly after the petition is presented, then it means that the vast majority of workers would not be there to vote, they would be gone.

Q Mr. Chavez, if under the California statute an employee raises a question concerning representation, when is the hearing on that question conducted?

A The hearings on those issues is conducted after the election is held, because the intent or at least what we argued was that: let the workers vote and then let the issue be decided afterwards so at least we have the [140]
ballot, the workers voted, at least they were able when the majority of the workers were there, were able to cast a ballot to decide union representation.

Q I will tell you that the Arizona Act calls for: if an employer raises a question concerning representation that that hearing would be held before the election. Do you understand that?

A Yes.

Q In your opinion, again based on knowledge of the seasonality of the industry, the migrant patterns of farm workers, their seasonal nature of their work, and your experience in California, what is your opinion as to the effect that delaying the election until after this

hearing would have upon the rights of farm workers to participate in these elections?

A Well, it would be very difficult because, as I said before, the hearing would take time. So it means that because of the short season — and the seasons aren't any different than in California here — because the crops are the same and the practices are the same in many cases — a large number of farm workers would not be able to make a determination through a secret ballot whether or not they wanted a union, and a minority of the workers would be making those decisions for the workers, the majority of the workers.

* * *

Q I would like to refer you back to the exhibit that [14
has been marked Plaintiff's Exhibit 1. Have you seen that exhibit before?

A Yes.

Q And do you know how this exhibit —

MR. RUTKOWSKI: Do each of the judges have a copy of that? It is the one that is highlighted in yellow.

Q Do you know how that chart was prepared, Mr. Chavez?

A Yes.

Q How was this prepared?

A I asked that the chart be prepared in this form and highlighted so we could explain to the Court the seasons — the seasonality of the crops.

Q Would you tell us where the information that appears on the chart came from?

A It came from the records that were given to us from the growers through their attorneys and I understand was a stipulation to the facts.

Q So all this data was data taken directly from the [145]
stipulated records that the growers supply, is that right?

A Yes.

Q And what data was placed on the sheets from those charts?

A The data dealing with crops, employers, and weeks of employment, peak harvest and total harvest and dealing with three years: '74, '75 and '76.

Q Could you please tell us what the highlighted areas mean on these charts?

A The highlighted areas means that there is at least fifty per cent or more of the peak employment represented by those highlighted areas in those periods.

JUDGE CRAIG: Does each column represent a week? For example, El Dorado, '74, there were four weeks, two of which were around 495.

THE WITNESS: Yes, Your Honor.

Q Do you know the numbers in the figure were from the end of the pay period for that particular week, is that correct?

A Yes.

MR. RUTKOWSKI: Your Honor, I would like to move that what is marked Plaintiff's Exhibit 1 be admitted into evidence as a compilation, a summary of the harvest season, all the harvest season data that

appeared in the stipulation that was presented this morning.

* * *

Q (By Mr. Rutkowski) Based upon your earlier testimony about the time required to collect authorization cards and the fact that the lack of access under the Arizona Act may add to that time, what is your opinion about the ability of a labor organization to obtain a secret ballot election under the Arizona Act in these seasons? The seasons are on Page 1 of Plaintiff's Exhibit 1. [154]

A Could we obtain an election?

Q Yes.

A No. No, we could not, in most of these cases.

Q For what reasons do you base that opinion?

A Well, based on the employment peaks here, represented in this chart, based on the fact that in almost every single election in California it takes us an average of three to six weeks to just get the cards and then another week to be able to hold the election. If that is not present, we cannot do that in Arizona. It would be difficult in most cases to have elections while the workers are there.

JUDGE CRAIG: How would you cure that, Mr. Chavez? Would you say to El Dorado or Boswell or Bodine. You have got to have a peak harvest for six weeks instead of five or four or whatever? How are you going to cure it?

A The way I would cure it is to change the law so that we would be able to have a period in which they have an election like California. The reason that we have a seven day mandatory period in which to have the election is precisely for that reason. All the arguments come afterwards. [155]

JUDGE CRAIG: If you got to get your signature cards and you have only got two weeks, you are not going to make it, are you.

THE WITNESS: Most likely not. Even with the California law, we wouldn't make it.

JUDGE CRAIG: Thank you.

Q (By Mr. Rutkowski) If I may follow up Judge Craig's question, Mr. Chavez, assuming the same hypothetical but add to the fact that the law would require an election within seven days after you filed a petition, do you have an opinion as to whether or not it would be possible to have a secret ballot election in the same harvest seasons?

A Yes. Many of these are for a four-week and five-week period. We would be able to have an election.

Q I would now like to refer you to Page 2 of Plaintiff's Exhibit 1. Would you please tell us which crops are represented on that page. [156]

A On the second page we have lettuce — fall lettuce, Yuma, Phoenix, Morana.

Q Do the highlighted areas indicate the period of peak harvest, again?

A Yes.

Q I would like to ask you the same question —

JUDGE MUECKE (Interposing) Again you are meaning peak employment. Isn't that what you are talking about again?

MR. RUTKOWSKI: Yes, Your Honor.

JUDGE MUECKE: Why don't you use that phrase? I really would appreciate it if you would, since that is the phrase the witness used and has defined.

Q (By Mr. Rutkowski) Based upon your earlier testimony about the time required to gather authorization cards, and based upon your testimony of the time required to gather authorization cards, and the possibility of additional time, because of unfair labor practices by employers, do you have an opinion regarding whether or not labor organizations could petition for a secret ballot election within their seasons listed on Page 2 of this exhibit?

A In Arizona? With the Arizona law?

Q Yes.

A In my experience it would be difficult to qualify to get the majority of the workers to vote in elections because of the season — because of the employment peak.

JUDGE CRAIG: If you had that kind of a season in California you would have the same difficulty, wouldn't you?

If it takes you three to six weeks in California to get your election in order you are not going to be able to make it in two weeks on Wood; you are not going to be able to make it in Yuma. In Phoenix you might be able to make it, to have made it in 1975 but you

wouldn't make it — well a possibility in '76 if you cut it to four. But you wouldn't make it on Norton in '75 or '76, even under California law.

THE WITNESS: That is right. It would be very difficult. We have a number of employees in California that can't make it under the law. It would be very difficult.

JUDGE MUECKE: Actually your testimony — without having to go on each page — your testimony would be that if you could hold an election in three weeks that obviously you could do it any place where it would show a three week period. If it went longer than that — if it just showed a three week period, you wouldn't be able to do it but given the seven day law or something of that kind — which would put a limit on it — on that basis, whether it would be possible for you to hold an election — doesn't that apply to each and every one of these papers? [158]

THE WITNESS: Yes, it does.

JUDGE MUECKE: The same testimony given to Page 1 would apply to all the rest of the pages in this exhibit, would it not?

THE WITNESS: Yes, it would.

JUDGE MUECKE: I think we understand the point. I don't think you have to apply it to each of the pages unless there is something different. I am just trying to save you time.

Q (By Mr. Rutkowski) If I might ask one hypothetical, it would apply to each of the four pages, Mr. Chavez. That is, I would like you to assume that the time necessary that you testified earlier to select au-

thorization cards would be three to six weeks. All right?

A Yes.

Q And then I would like you to assume hypothetically that from the point the petitions were filed to the time the elections were actually held would be an additional five to seven weeks.

Given those two stages do you have an opinion as to whether or not it would be possible — under the Arizona Act — to have organized for secret ballot election among farm workers during any of these peak employment seasons.

JUDGE KILKENNY: Counsel, I don't believe I understand your question.

JUDGE MUECKE: I don't know where the five to seven came from.

MR. RUTKOWSKI: Just in regard to this question only, Your Honor, I am laying foundation for testimony that will come later in the trial.

JUDGE MUECKE: All right. Tie it in. In other words, you are saying that given the difficulties caused by Arizona law, you are adding at least two weeks more. In other words instead of being three to six you are saying five to seven.

MR. RUTKOWSKI: That is it, Your Honor. Five to seven in addition to the three to six.

JUDGE MUECKE: You are adding five to seven to the three to six?

JUDGE CRAIG: As I understand you, counsel, what you are saying is that it is going to take him three to six weeks to get organized. After he gets organized and files the petition, assuming a wholly [160] hypothetical period of time of five to seven weeks before an election. Then you say assuming that hypothetical would he be able to get a majority of his workers in an election. He says no; right?

MR. RUTKOWSKI: Yes, Your Honor.

JUDGE CRAIG: Okay.

JUDGE MUECKE: You are going to tie that in later to five to seven weeks.

MR. RUTKOWSKI: Yes.

JUDGE MUECKE: All right.

Q (By Mr. Rutkowski) Mr. Chavez, I would like to refer you to the fourth page of Plaintiff's Exhibit 1, the bottom of the page where it says "Green onions."

JUDGE CRAIG: What page? Four?

MR. RUTKOWSKI: The last page, Your Honor.

Q (By Mr. Rutkowski) Have you looked at the figures for the green onions, Mr. Chavez?

A I have, yes.

Q In relation to your earlier testimony about the time required to gather authorization cards for various crops, would your testimony vary at all in regard to specifically the green onion harvest?

A If there are 39 weeks of peak employment, no.

Q Are there any particular difficulties in gathering thirty per cent or even fifty per cent authorization cards in this industry?

A In the green onion industry, as you may know, it is what we call — it is a day haul type of industry. That is that people work there and they are paid in most instances — there may be a few not but in most instances my experience both in Arizona and California, they are paid every single day in cash money, so that that is an industry where there is a tremendous amount of turnover. I don't know — if the turnover were not that significant we would be able to have elections but if the turnover is such that if we do not establish a majority because of the constant turnover then we would not be able to win an election.

Q Does the person who participates in the work force in green onions vary in any fashion from the work force in other crops?

A Yes.

Q In addition to what you have already testified?

A Yes. The green onion harvest employs a large number of minors, both in California and Arizona, and particularly in Arizona. So that there again we have to exclude anybody under sixteen years of age in terms of voting because, as I am told, the law would not permit them to vote. So that would be another factor to consider.

* * *

Q Now finally I would like to refer you to the part of the Plaintiff's exhibit which is marked "Citrus" which shows a harvest season of respectively forty-nine and forty-five weeks. In regard to the practical problems of meeting the thirty per cent authorization requirement of the Act are there any particular problems related to the citrus industry?

A We have a problem in California that is similar to the one we would have in Arizona, because the industry structure is pretty much the same. That is, first we would have to determine who the employer is. You have the Arizona Citrus Growers, I understand is an association that represents forty or so growers. The forty-nine weeks represents harvest activity or peak employment activity in those forty or so members, and we are unclear of this but if the Board or the law ruled that each and every citrus employer is a separate employer we would have to have elections with that employer, we would never qualify even though it is forty-nine and forty-five weeks.

On the other hand, if it is ruled that the Association is in fact the employer, we would probably qualify. If it is ruled that the labor contractor which brings people into the Association — this is the majority of the cases — there may be some exceptions, then it may be difficult to qualify. [163]

MR. RUTKOWSKI: Thank you.

JUDGE KILKENNY: Wouldn't that be true in California, too?

THE WITNESS: Yes, it is very true in California.

JUDGE KILKENNY: Well then, what is there in this legislation that might be cured — let's put it that way. Suppose the legislature says, I will give you everything you want with the citrus growers. What could you propose?

THE WITNESS: I would propose that the Association would be the employer. The Association represents twenty, thirty, forty, a hundred employers that are in many cases small employers and because of

what is known as a pro-rate system, that the employer has a quota that they can sell, they can't sell all the fruit at the same time so that the picking then — it is alternated between all of these employers and if the Association is the employer then the thirty-nine weeks, the forty-nine weeks would make sense and we could qualify. But if the ruling would be that each and every individual citrus employer would be separate that they work — the experience in Arizona and in California — that they work two or three days in one ranch, a week at the very most, there are exceptions where one ranch may be a very large plot of land so they may work more there. But the majority of the ranches in citrus, both California and Arizona, are made up of small employers. The average I believe is something like twenty, thirty acres.

JUDGE KILKENNY: Well, in other words what you are saying is that what should be done, what the legislature should do would be to force the little growers to act under one head.

THE WITNESS: They are already that way. The Association —

JUDGE KILKENNY: If they are, then why don't you look — if in fact they are, why can't you look to the Association?

THE WITNESS: I would say that this would be — if that is the case then we could hold elections.

JUDGE KILKENNY: No, not that we look to it; why don't you look to it? You say this is the fact.

THE WITNESS: I am told by our legal department that that question is pretty much unresolved and it hasn't — it is very unclear.

Q (By Mr. Rutkowski) Mr. Chavez, those are the only questions I had in regard to the exhibit. [166]

I would like to present to you another hypothetical. That is: some persons have suggested that the problems that you have raised this afternoon could be cured by asking workers to remain in the area until the election were held were it scheduled after the harvest season.

The question I would like to pose to you: assuming that situation where the Union went in and organized during the harvest season petition for an election. For whatever reason by the time the Board scheduled the election it was scheduled for a time after all the work had ceased for that particular employer. Given that set of facts, do you have an opinion as to whether or not it would be possible to have a secret ballot election wherein the majority of agricultural employees that work on that ranch could participate?

A Yes. My opinion is — comes out of experience, where we can do well within one or two days after the employment ends. They will wait around for that long. But by the third day you begin to lose some of them.

By the fourth and fifth day most of them are gone. It is a very difficult problem. They will wait one or two days. [167]

We have experienced that in California because we have had some elections that are scheduled in seven days, but if the peak employment or the job terminates at, say, the fifth day, the election has to be held on the seventh or eighth.

If the job terminates maybe on the fourth day and the election is held on the seventh day, we run into problems.

Q Is it your testimony that in your experience in California, even with the seven day provision, some harvest seasons have ended before the seventh day arrived?

A Yes. There are some cases.

Q It has also been suggested by some persons, Mr. Chavez, that another way to remedy this problem would be to schedule that election for the next peak season. Do you understand what that means?

A Yes.

Q Assuming a situation where under the Arizona Act agricultural employees petition for an election and for whatever reason again at a time the Board scheduled the election the harvesting ended, would it in your opinion be a satisfactory remedy to schedule that election for the next peak harvest time?

A I don't think so because you would not be — in many instances the work force changes. It would be almost impossible to have the same workers return to the same grower.

Also, we would run into problems of exposing the workers to the problems of — those that were identified with the Union being identified with the Union and getting a job back the second time as we have found in some instances in California who do not have an election right away that they have a difficult time getting jobs back once they are identified as being pro-union.

Q Mr. Chavez, do you have any information always regarding whether or not there are agricultural employees regularly working in fields who are under the age of sixteen years old?

A There are, yes.

Q And from where do you get this information?

A Well, from various sources. One, our own personal observations; from our staff; from workers themselves; from our service centers where sometimes workers under age sixteen will come in for a particular service, and most recently from an article that was published in the Tucson Daily Star, I believe was the name of the paper, wherein one or two growers admit [169]
there are minors working, expecially in the green onion fields. And from a study made by the Department of Agriculture that was just released this couple of weeks ago for 1975 where the study revealed that thirty-two per cent of the work force, agricultural or farm labor work force in the United States, according to the article thirty-two per cent are younger — are between the ages of seventeen — and I believe younger than age 17 - 17 and younger. Thirty-two per cent; almost a third.

* * *

Q (By Mr. Rutkowski) Mr. Chavez, I will tell you [170]
that the Arizona Act does not permit agricultural employees under the age of sixteen to participate in secret ballot elections. Do you understand that?

A Yes.

Q Based upon the information you just told us, do you have an opinion as to what the effect of that provision — that provision would be upon the rights of some agricultural employees to participate in representation elections?

JUDGE MUECKE: I suppose your answer to that would either be yes or no, that you have an opinion or don't have an opinion.

THE WITNESS: I do have an opinion.

Q (By Mr. Rutkowski) What is your opinion?

A That there are workers, those workers under the age of sixteen that would not be able to vote.

JUDGE MUECKE: What do you base that upon?

THE WITNESS: On personal observation, reports from our staff, involvement with the work force that survey by the Department of Agriculture.

Q (By Mr. Rutkowski) When you say reports from your staff, are you saying — have there been reports from the staff in Arizona as to employment of persons under sixteen years old in Arizona agriculture?

A Yes.

Q And from your experience in California has the experience been the same in that State?

A Yes.

Q From your knowledge of — let's assume that the study by the Department of Agriculture is correct, in your opinion is there any reason, based upon your knowledge of agricultural employees in Arizona and California, to believe that the percentages of persons

within that age bracket would vary substantially from the figures you gave?

A Our observation is that it really goes by crops. There are certain crops that are prone to using minors and there are others that aren't. Green onions is one of those crops that will use minors.

Q Based upon your experience in organizing, do you have an opinion as to whether or not persons who are sixteen years old or younger should be permitted to vote in these elections? [172]

MR. KYL: Excuse me, Your Honor. If that falls within my continuing objection I just want to have it noted. I think that is strictly hypothetical and conjectural and irrelevant.

JUDGE MUECKE: Well, he may have a reason based on his past experience and perhaps he can amplify that.

Do you have an opinion whether they should vote or not? You can answer that yes or no.

THE WITNESS: Yes, I do.

JUDGE MUECKE: What is the reason or basis for such an opinion?

THE WITNESS: The basis of the opinion is that in some crops both in California and Arizona the minors constitute a very sizeable percentage of the work force. In some cases those minors are full fledged farm workers, meaning that they are working in the fields day in and day out, and as it relates to some of those crops where minors are used, excluding those

workers from voting would deprive a worker from determining representation, from participating in the process for representation.

JUDGE KILKENNY: What do you mean by sizeable?

THE WITNESS: Your Honor, if you take in California the rasin-grape industry, I would say that without fear of being too far off I would say that eighty per cent of the rasin-grape is harvested in California by children sixteen and under — strawberries, green onions they use a lot. I don't know the percentage in Arizona but we do know for many years that minors, children are used in the work in the fields.

* * *

Q I am telling you that under the Arizona Act for an agricultural employee to be eligible to vote in a representation election at a specific ranch, for a specific agricultural employer, he had to work for that same agricultural employer during the preceding calendar year. That is January 1 to December 31 of the preceding year. Do you understand that statement?

A Yes.

Q Assuming that that were in fact the case, do you have an opinion based on your knowledge of the agricultural employees seasonally related to their work, whether or not that would result in preventing some employees from participating in secret ballot elections?

A It would prevent some from voting, yes.

Q For what reason?

A A certain percentage of workers do not return to the same grower year in and year out, and new workers come to work every year. This is a pattern in agriculture. This happens. [176]

JUDGE MUECKE: Did you say thirty per cent?

THE WITNESS: No. Just a certain percentage. I don't know what the percentage is.

Q (By Mr. Rutkowski) Mr. Chavez, this would be my final question in regard to the election provisions and that is: you testified earlier that normally in an election campaign you attempt to obtain eighty per cent authorization cards before you file, is that correct?

A Yes.

Q Could you please tell — I am not sure if the record is clear — as to what is the purpose for obtaining that percentage rather than what is minimally required by whatever statute is applicable.

A Well, our experience has shown not every one who signs a card will vote for the Union.

Also, in that two or three or four week period from the time we get the first card until the time we have the election some workers will move out, will no longer be there, so it is expensive and time consuming to be engaged in elections. You can't win because whether you win or lose the election there is almost always litigation that follows which is more expensive so there is also a commitment made by the workers, the workers will be committed because they become identified with the Union. Our experience has been that in some cases the employer will take action

against those workers and they will suffer some consequences.

So to prevent all this, problems that come after the election if we lose the election, we try to be reasonably sure we are going to win an election and the record shows that we won the majority of elections that we engage in.

Q I will tell you, Mr. Chavez, under the Arizona Statute, the exclusive procedure by which the Agricultural Labor Relations Board can order an employer to negotiate with the Union is if that Union has been certified by winning a secret ballot election. Do you understand me?

A Yes.

MR. KYL: Excuse me, Jim, before you ask another question.

Your Honor, this is another matter that we have a differing legal interpretation on. I think we can make the same objection and the same ruling would be appropriate.

JUDGE MUECKE: Yes, and it is in your pretrial and your objection is set forth there. The record may show a continuing objection as set forth in the pre-trial order to that issue.

Q In terms of some foundation, in your experience in over four hundred elections that you have held in California in the last year and a half, your knowledge of these elections and as you indicated earlier, some instances of employer unfair labor practices, have you occasionally situations where the union thought it necessary to petition the Board that an employer be

ordered to bargain without — after the Union had lost the secret ballot election?

A I believe that we have a few of those petitions before the Board now.

Q Under what circumstances has the Union found it necessary to petition for such bargaining orders?

A When the conduct of the employer in our opinion has been such that it has prevented the workers from voting because of intimidations, because of false promises, because of captive audience meetings.

When the atmosphere in the election is not conducive to a free choice, when there is intimidation, fear, firings and so forth, we have gone to the Board and we have petitioned that even though we lost the election, that the Board should order the employer to bargain with the Union. But also we had a substantial number of cards signed, going into the election.

Q What in your opinion, based on these experiences, have you found it necessary to petition for such an election, would be the result if we had a law which did not provide or enable the administering board to order an employer to bargain, absent the Union winning the secret ballot election? [179]

A Well, it would be a merrygoround. We would then have to wait until the next year to have another election. It would not really effectively deal with the problem of interference with the rights of workers to vote without being subjected to pressures from the employer.

We find in California that in some cases this has been the remedy that we sought.

Q Assuming again a situation where the Board is not empowered to order bargaining outside the secret ballot election, and an employer so continues to make these unfair labor practices that the secret ballot election process itself never operates fairly, do you have an opinion as to the effect that would have on the ability of a union to be certified at that particular ranch?

A I don't see how the union could win an election under those circumstances and it would be extremely difficult. It means we would be holding elections every year to come back to the same problem.

Q I would like to draw your attention to Exhibit 2, [180]
a copy of the Act, Section 1384, Page 5. Are you familiar with that section, Mr. Chavez?

A I had this section interpreted to me by our attorneys and I read the section.

Q I would also like to refer your attention to 1385-D, Page 11, Lines 2 through 8. Would you please read that.

I am sorry. Excuse me ... You should start, I guess, on Page 10, the very last sentence, Line 31.

JUDGE CRAIG: I am missing Page 11.

(Discussion off the record)

JUDGE MUECKE: Go ahead.

Q By Mr. Rutkowski) Have you had a chance to read those?

A Yes, I have.

Q Mr. Chavez, you testified earlier that you participated in at least over a hundred collective bargaining sessions in regard to the American Farm Workers Union, is that correct?

A Yes.

Q Do you have an opinion as to the practical effect - excuse me, strike that.

Based upon your reading of this section and your consultation with your attorneys, what do you [181]
understand these two provisions to mean in terms of practical effect on negotiating a collective bargaining agreement?

A That there are certain issues that are considered to be by the law management rights and that the Union cannot enter into negotiations in those particular items with the employer.

Q If in fact these provisions and the other provisions of the Act that may apply mean that an agricultural employer need not negotiate about these provisions, do you have an opinion as to the practical effect, the exclusion of these topics from the collective bargaining procedures would have upon attempts of farm workers to organize a union?

A I do, yes.

Q And what is that opinion?

MR. KYLE: Just for the record, the same objection: the differing legal interpretations.

JUDGE MUECKE: Right.

A There is a section there that classifies — to sell or lease any of the real or personal property involved therein. We don't know if this means that we cannot — we will not be able to negotiate a successor's clause. Our legal department tells us that we may not do that. There is a section that deals with it. Line 6: "—to de- [182]
termine the methods, equipment and facilities to be used in producing agricultural products. . . ."

If by that is meant that we could not enter into negotiations regarding mechanization and displacement of workers because of technology, then it would be very detrimental to the Union. I don't know what it means but if it means what I think it to mean, then it would have a very bad effect on the Union.

Q Referring you to Page 5, Line 21.

A Line 21?

Q Yes.

A Line 21?

Q Subsection 2 there.

A Subsection 2.

Q "To hire, suspend, discharge or transfer employees in accordance with his judgment of their ability".

A I have an opinion.

Q Do you have an opinion?

A Yes, I do.

Q (Continuing) — as to the result, if in fact the law excludes these topics from the collective bargaining process or makes them contingent upon the employer

consenting to bargaining to them, what practical effect [183]
that would have upon negotiating, forming a union for farm workers.

A I don't know the legal interpretations, but if it means that the employer has the sole right in questions of hiring, then it may mean that we are not able to negotiate a hiring hall. It may mean that we don't have the right to negotiate a seniority clause. If it means to suspend or discharge or transfer workers — if that means that we cannot grieve on these matters, then the union would be no more than a referral agency, an employment agency.

The right to grieve is fundamental in a labor agreement — the right to grieve when the employee feels that he was dealt with unjustly. And if the interpretation is that we cannot grieve on suspensions and discharges, then it would be very detrimental to the Union and to the workers.

Q Mr. Chavez, when you as President of United Farm Workers of America participated in drafting and lobbying for legislation when you read Section 2, do you have any difficulty in understanding the intent of the words that are set forth there?

A I am very clear that to hire, suspend, discharge or transfer employees is part of the management rights, the rights of employers under this Act, and it is to be done with the judgment of the employers on the ability of the workers.

Q As a person, as a layman with significant background in labor organization, do those words on their face have meaning to you that relates to specific operations and practices that do take place in the field that you would negotiate about? [184]

A If this language was part of the contract that we were negotiating, that means that we have very little to say about management rights in terms of negotiations.

* * *

DIRECT EXAMINATION (Contd.)

BY MR. RUTKOWSKI) Mr. Chavez, when we left off yesterday afternoon I believe we were talking about management rights section. If I may refer you again to Page 5 of the Arizona Act, particularly Lines 21 and 22, would you read those, please. [1

A I have.

Q I ask you, you told us that you negotiated some one hundred collective bargaining agreements in 1970, '71, is that correct?

A That is correct.

Q Have you participated in collective bargaining sessions since that time?

A I have, yes.

Q On a fairly regular basis?

A I do participate. Not as regularly as I did before.

Q In all these previous bargaining sessions that you participated in, have you negotiated provisions in collective bargaining sessions, or attempted to, regarding topics listed in Section 2? [186]

A Yes, we have.

Q I am telling you that under the Arizona Act it is discretionary with the employer as to whether or not he wishes to negotiate about all the topics listed in 1 through 5 in that section. Do you understand that?

A Yes.

Q Including those listed in Section 2. Do you understand that?

A Yes.

Q Based upon your experience in collective bargaining, do you have an opinion as to what would be the effect upon the Union's ability to participate in collective bargaining as to negotiate collective bargaining contracts if you could not, because the employer refused to do so, negotiate about the topics listed in sub-paragraph 2?

A I need a clarification. Would refusal be due to the law or refusal because he just doesn't want to negotiate.

If in California they refuse then we can strike, we can boycott, we can bring an action to bring that about.

Q Okay. Let me give you another factor and I will [187]
tell you then that under the Arizona Act if you threaten the employer with a strike because he refused to negotiate about one of these acts it would be an unfair labor practice. Do you understand that?

A Yes.

Q Given that circumstance, where the employer was refusing to negotiate because of the law, because he claimed it was illegal, in your opinion what would be the effect upon the collective bargaining process if you could not — would you strike that, please.

Let's put it this way. I want you to assume the fact that it is illegal under the Arizona Act to coerce an employer — an employee to coerce with threat of a strike an employer to negotiate about these topics. Do you understand?

A Yes.

Q Now I want you to assume a situation where an employer under those circumstances, because of the Act, refuses to negotiate about the topics in subparagraph 2. Do you understand that?

A Yes.

Q In those circumstances, based upon your experi- [1
ence, what would be the effect upon the Union's ability in the collective bargaining sessions to negotiate a collective bargaining contract for agricultural employees?

A Well, I would say it would be detrimental to the workers and to the Union. I don't see how we could properly represent workers if we could not grieve about, for instance, their discharge. I don't think that

the Union could get very far. I don't think that the workers would be encouraged to join the Union or even if they did, encouraged to participate and be part of it. And I don't know that our own Union would engage in collective bargaining.

If we could not do something about workers' discharges I think that I, for one, personally would most likely not sign a contract if I could not get the right of workers to grieve in cases of discharge.

* * *

Q (By Mr. Rutkowski) Mr. Chavez, in the collective [189]
bargaining process when these topics do come up in the context of those sessions, in what context are they raised or in what form would they appear in the collective bargaining agreement, referring specifically to matters regarding —

JUDGE KILKENNY: Suspension and discharge, you mean?

MR. RUTKOWSKI: Suspension and discharge of employees, yes, Your Honor.

A Under what section of the contract?

Q Yes, in what fashion would they be dealt with in a collective bargaining agreement?

A I don't understand your question.

Q When —

JUDGE MUECKE (Interposing) In what way is it a subject for negotiation? What do you negotiate about with respect to that paragraph?

A I see. Well, we negotiate about discharge, that [19
the employer has the right to discharge someone but we have the right to grieve about this — about that discharge.

On the question of suspension it is the same thing. The question of transfer. We want to grieve because that may interfere with our agreement if there is an agreement, for instance, on job classifications and pay for those — wages rates for those classifications.

JUDGE KILKENNY: By that do you mean that you have a right under your procedure, the procedure you would like to follow, to place this grievance before a grievance committee and if the grievance committee went a certain way, why then you could have a further step that you might take if the employee were not reinstated?

THE WITNESS: Correct. The arbitration procedure, that would be final and binding. But we would be able to negotiate about these items in the formation of the contract.

Q (By Mr. Rutkowski) A final question on this point, Mr. Chavez. Based upon your experience again in collective bargaining, if in the collective bargaining process you could not negotiate about these topics or about grievance procedures relating to these topics, do you have an opinion about the ultimate effect upon the ability of farm workers to organize a union under these restrictions?

A It would be very difficult to demonstrate to the [191]
workers the use and the need of a union. We couldn't do anything about a worker being discharged. We couldn't even grieve about it.

I have grave doubts that the workers would be interested in a union.

* * *

Q (By Mr. Rutkowski) Mr. Chavez, in relation to [194]
your last statement are you familiar—have you experienced any situations where an employee was discharged and the reason given was he was unable to do a job when there were perhaps other reasons for that discharge?

A Yes. We found both situations when in fact the worker was not able and there is not much of a case there. But we have also found that in cases where—by just prior work experience, he was being discharged for being unable to do the job, when in fact it was something else, yes.

Q And what were the other reasons for which he was actually being discharged in those experiences you have had?

A In many cases it comes back to the foreman and the worker not getting along for other reasons other than the work. In some cases, misunderstandings in orders given for a particular job to be performed.

Q All right, thank you. Are you familiar with what [195]
are commonly called, I believe, stitching and hauling functions in the agricultural industry?

A Yes.

Q And are you also familiar with the process of those workers who pack inside packing sheds in the agricultural industry?

A Yes.

Q I would like to direct your attention to Page 3 of Paragraph 6 of the pre-trial order which is a stipulation entered into by the parties describing these functions. Would you please read that stipulation.

JUDGE CRAIG: What page?

MR. RUTKOWSKI: Page 3, Paragraph 6 of the pre-trial order, Your Honor.

A I have it.

Q Mr. Chavez, in your experience in agriculture have you had occasion to observe these functions being carried out by agricultural employees?

A Yes, I have.

Q Also, in your experience in agricultural and organizing have you had occasion to observe any strikes or work stoppages by employees engaged in any of these functions?

A Yes.

Q Could you please tell us what experiences you have observed of work stoppages by these groups?

A I have seen—observed a situation in Salinas where the truckers and the stitchers at the Inter Harvest Company in late 1970 refused to work because that company had recognized our Union after a card check and were engaging in negotiations with us and the truckers and the stitchers refused to work, refused to move their trucks even though they were under con-

tract to another Union, and then also strike in Salinas Valley by the truckers and the stitchers, I believe two or three years ago.

Q In these two situations that you observed, Let's take the first one, this was the Inter Harvest Company in 1970?

A Yes.

Q What was the result of the work stoppage by the haulers and stitchers upon the harvest activity at the ranch at that time?

A Well, everything stopped. Everything came to a standstill. No trucks and no stitchers. Nobody was working.

Q For how long did this situation continue? [197]

A A few days. I believe about a week or so.

Q And in the second situation how long did that continue?

A In the strike situation?

Q Yes.

A I don't recall the exact time but it was around probably three weeks or so.

Q And during this period were the agricultural employees who worked in harvesting the crops, were they able to work?

A No, they were not.

Q Why was that?

A Well, the truck drivers and the stitchers were on strike and that pretty much ended the harvest because you can't move—if you can't move the produce, no sense harvesting.

Q Based upon these experiences you had as well as your knowledge of these functions and their relation to other functions of agricultural employees, do you have an opinion as to the effect of a strike by the stitchers and haulers upon the harvesting, production and shipping of agricultural products?

* * *

Q All right. Based upon your observation of the work stoppage or these two work stoppages by stitchers and haulers, your knowledge of their function in general and how they relate to other operations in the agricultural industry, do you have an opinion as to the effect of the work stoppage, strike by stitchers and haulers, upon the harvesting production and shipping of agricultural produce?

A They have been very successful in terms of stopping the production.

Q Have you observed—are you familiar with operations that take place in packing sheds in some industries in agriculture?

A Yes.

Q If I may, just very briefly, present—well, could you—let me give you this hypothetical: Assume that there is—let me ask you:

Is melons one of the crops that are packed in packing sheds?

A Yes.

Q By melons, I am referring now to cantaloupe.

A Yes, cantaloupe.

Q Assume there is a cantaloupe or melon grower who packs his own—his melons in his own packing shed, and assume a second pack and that is that the only melons he is packing are from his own fields, he is packing melons for no other agricultural employer.

Given those circumstances do you have an opinion as to the effect of a strike by the workers in that packing shed upon the entire process of growing, harvesting, and shipping those agricultural products, those melons?

A Well, it would have a very detrimental effect on the packing and shipping of the melons because if they are not packed they can't be transported, they can't be moved. [200]

Q In the same situation do you have an opinion as to how a strike by the persons in that melon packing shed would affect the harvest, compared to a strike by the employees in the field who were actually picking the melons?

A If the melons are not packed they will not be picked. There would be no sense of picking them if they can't be prepared for shipping.

Q So is your answer that the effect of the work stoppage by either group would be essentially the same?

A Yes. We have seen throughout our history in agriculture, that when packing sheds are striking, all those people who work in the fields many times are idle.

* * *

Q (By Mr. Rutkowski) Mr. Chavez, based upon [203] your personal visit to Arizona during this time, the contact you had through the offices that the Unions maintain in Arizona, could you tell us what damages farm workers in the State of Arizona and the United Farm Workers Union have suffered as a result of the passage of this Act?

A That the workers in terms of wages and fringe benefits and morale to build their Union have been hampered by the passage of the law.

In terms of the Union, our Union has been dam- [20
aged seriously in its efforts to boycott products in the State of Arizona. We have had a number of restraining orders. The Board has issued complaints against the Union. It has cost us money, attorneys' time.

JUDGE KILKENNY: What type of restraining orders, Mr. Chavez?

THE WITNESS: In relation to the right — in relation to our boycott activities, to leafletting, to talking to consumers about boycotting the product, an order against us preventing us — a TRO preventing us from engaging in conversation with the store management asking them to honor the boycott.

JUDGE MUECKE: Can I ask a question. Are all these matters covered by what is attached to the pre-trial order? The answer to the question you just posed?

MR. RUTKOWSKI: Yes, Your Honor.

JUDGE MUECKE: The Board actions?

MR. RUTKOWSKI: Yes, all the Board actions.

JUDGE MUECKE: That includes all of them, doesn't it?

MR. RUTKOWSKI: Yes, Your Honor.

JUDGE MUECKE: That is what I thought. So your references, presumably the reference of Mr. Chavez would be covered by the attachments to the pre-trial order.

MR. RUTKOWSKI: In so far as they relate to [205] the lawsuits and complaints filed against the Board, yes, by the Union.

Q (By Mr. Rutkowski) Mr. Chavez, you mentioned in regard to the Union's activity, that there has been an injury to the Union's ability to boycott. Could you tell us in what respect the law has impeded that activity?

A Well, very significantly in our right to leaflet, to distribute leaflets to customers as they approach the stores, in what we consider our right to speak with customers as they approach the retail establishments, in preventing us from communicating to those customers our campaign to boycott the products.

Q Has there been any effect upon participation in the boycott by persons in Arizona as a result of passage of the Act?

A Well, there were some arrests. There were some — not arrests but some restraining orders issued or RTO's issued against the Union. It did have an effect, a direct effect on our supporters and our volunteers. We found them less willing to come out and boycott because of the uncertainty of the right to do it under the — or the harrassment they were receiving under the law.

Q You mentioned in relation to farm workers — I [20
believe you mentioned wages of farm workers in Arizona have suffered since passage of the Act. On what fact do you base this statement?

A Just the differences between what they were before the law and as compared to California where we now have a law, and what they are now. The differences are growing every day more and more.

Q You also mentioned, I believe, that you felt that benefits of farm workers, fringe benefits, had suffered as a result of passage of the Act. Would you tell us in what fashion, on what facts you base that statement.

A We have not been able to organize any workers in Arizona. Not doing that, we have not been able to provide for them the benefits that we have been able to provide for those that we have organized in California.

Q I believe another fact you mentioned, I think you said loss of morale of workers in organizing a union. Could you tell us what you meant by that.

A What I meant by that is that there was wide publicity given to this law at the time that it was signed by the Governor. Even the time when it was being debated in the State Legislature. And then since [207]
then, because the Union involved in a campaign for a recall of the Governor who signed the law and so that in the course of all that publicity the workers came to understand what we were up against and our experience has been that we found many of the workers dropping off and telling our staff and telling me directly in some instances that they didn't see how they could organize a union with the law — with the present law hanging on their necks.

Q Has this law had any effect upon union membership in the State of Arizona since its passage?

A It has had, yes.

Q And in what way?

A My opinion is that when the law was passed we had around six contracts in Arizona. We lost all the contracts except one.

We feel that while the California growers brought in the Teamsters to get rid of our Union, here after the law was passed in Arizona the employers went non-union with the exception of one, we found that the employers then in 1973 were not interested in negotiating — the same employers that had negotiated with us in 1970. Our feeling is that they felt secure, that

very little could be done by our union because of the present law and therefore we lost the contracts and the membership. [208]

Q Mr. Chavez, one final question I would like. Based upon everything you told us in your testimony yesterday, particularly your knowledge, experience in organizing the farm workers in Arizona and elsewhere, and the knowledge of practical applications of portions of this Act, particularly in regard to secret ballot elections and I believe you mentioned boycott provisions — do you have an opinion again based upon your experience in organizing a union of farm workers, as to whether or not under this Act it would be possible to organize a union of farm workers in the State of Arizona?

A It is my opinion that it would be extremely difficult if not impossible to organize and maintain a union with the present law in California, as I understand it.

Q I am sorry. You said California.

A I am sorry. In Arizona.

* * *

Q Mr. Chavez, you told the Court yesterday that you had had no experience working under the Arizona agricultural law, is that not correct? [20

A Organizing?

Q Yes.

A Yes.

Q The United Farm Workers Union has never tried to organize for an election under the Arizona law, isn't that right?

A That is correct.

Q You never filed an election petition in the four and a half years of its operation?

A We have not, no.

Q You have, I believe, stated on at least two occasions that the Union in fact has no intention of ever seeking recognition under the Arizona Act? [210]

A That is right.

Q So when you testified yesterday about what you thought would happen if you tried to organize in Arizona, the problems that you thought would occur, you were not basing your testimony then upon actual use of the Act in Arizona, were you?

A I was not, no.

* * *

Q (By Mr. Kyl) Furthermore, with regard to the organizing problems and the problems relating to the holding of elections, your answers to the questions yesterday were not based upon any interpretations of the law by either the board or by the Court, but rather the interpretations which Mr. Rutkowski supplied to you in the questions, isn't that correct? [211]

A Yes.

* * *

Q Excuse me. Let me ask you this question. Do you [221]
know where most of the people live who work in the grape harvest in Maricopa County?

A I don't know.

Q You do not know?

A I don't think I know.

Q Okay. And do you know where most of the people who work in row crops and lettuce and melons? In Maricopa County?

A In lettuce, you are speaking of the harvesting of lettuce?

Q I am.

A Most of the crews come from California and [222]
most of the crews would tend to live in Mexicali, San Luis.

Q These are the lettuce cutters?

A The lettuce cutters, particularly the ground crews.

Q That is pretty common in lettuce generally, isn't it?

A I would say so. They come from San Luis, Sonora, from Mexicali, Baja, California, and I think in some instances they come across the border from Douglas, whatever the name of the Mexican towns are there.

Q There are a lot of crews who are also people living in the United States, are there not?

A I wouldn't say so, no. Not a lot of crews. Most of the crews live on the other side in Mexico.

Q Well, are you familiar with the crews that pick here in Maricopa County, Arizona, where they come from?

A Our experience in the research we have done from many of the companies that harvest lettuce, both in California and in Arizona, that would be the case, that they come from Mexico.

Q As to the ones who just harvest here, you don't know? [223]

A There is very few that just harvest here, and I wouldn't know but I know that the ones that harvest just in Yuma, as an example, their workers I would say almost a hundred per cent come from across the border.

Q I was speaking of Maricopa County.

A I don't know.

Q And you wouldn't know as to other row crops and melons where those workers come from, would you?

A I think in melons it would be pretty much like lettuce, but not in the same percentages. I would tend to think — and as I remember from my experiences, because as you know, we had tried to organize melons for a number of years — that many of the crews also came from the Imperial Valley and most of those workers, of course, live in Mexicali and San Luis.

Q I am speaking of Maricopa County Harvest here.

A Yes, they travel here also to engage in melon picking.

Q Do you remember when I took your deposition on September 16, 1975?

A Yes.

Q Do you remember — this is on Page 49 — do you remember that I asked you this question and you [22
gave the following response:

"Q Do you know where most of the people live who work in the row crops and lettuce? Include lettuce and melons and everything except vines and citrus in Maricopa County."

There is an objection by Mr. Rutkowski and then your answer was:

"A No, I don't."

Do you recall that?

A Yes.

Q Do you recall the answer?

A I think I do, yes.

Q And then you recall this question:

"Q Specifically you don't know whether they would live in Phoenix or in Glendale or in Tolleson or in some other part of the State or in a different State?"

Your answer was:

"A Right".

Do you recall that?

A Yes.

Q By the same token you are able to tell us what percentage of the workers in Arizona are migratory?

Either from state to state or within the state? [225]

A No, I couldn't. I don't know.

* * *

Q What is the typical size of the units that you organized in California this past year when you had all of those elections? [230]

A They ranged all the way from three employees to fifteen hundred — eighteen hundred employees.

Q Can you give us a typical size? [231]

A There isn't anything typical in agriculture. It is all over the map.

* * *

Q Okay. So that if you have — let's just make it easy — one hundred employees working at the peak of the harvest, that would be the projected total — then how many people would have to be working in order for you to file your petition? [243]

A Fifty.

Q Fifty, right. At least half.

A At least half.

Q And the eligible voters in the election, then, would be fifty, is that correct?

A In that case, yes.

Q And therefore half of fifty or twenty five plus one could vote for the union, could it not?

A They could conceivably do that, yes.

Q Right, so that is twenty-six per cent in that situation.

A I haven't seen it happen but I am sure it could happen.

* * *

Q So it is your testimony — or is it your testimony that in fact access is going to be denied in Arizona.

A Yes.

Q You believe that it is going to be denied?

A Yes, I believe so.

Q And you base this opinion upon what?

A Upon the — principally upon the advice of our attorneys but also from previous experiences.

Q But you understand that whether it is denied or not is a matter of legal interpretation.

A Yes.

* * *

Q I believe you testified that you really didn't know where the people who worked in Maricopa County lived.

A That is right.

* * *

Q And Mr. Ratkowski's question was that assuming that the Act were to be interpreted as requiring — interpreted to mean that the calendar year was some time in the prior numbered year — in other words this is 1977 but Mr. Ratkowski's interpretation was that you assume that the person worked during the year 1976 for the employer that in that case you felt that it

would deprive the right to non-repeat workers to vote, is that correct? Workers that didn't repeat their employment with that individual?

A I don't know that I understand your question very well. Let me see if I can qualify my answer. What I am saying is, my understandng of the Arizona law according to the interpretation given to me by our attorneys is that in order to be eligible to vote that employees must have worked with that employer previously, the year past, and I think it was mentioned a calendar year — the words calendar year. [259]

Because of that interpretation, then, the practical application would be that it would be extremely difficult for many workers to be able to vote in 1976 because some would have not worked in 1975 with the employer and some of the employees that worked with the employer in 1975 would not be working in 1976.

Q But that answer does depend upon the interpretation of the statute that your counsel supplied.

A If the interpretation is what they tell me it is, then the practical application would have that effect, yes.

* * *

EXCERPTS FROM TESTIMONY OF STANLEY LUBIN

Q And have you compared the Arizona Agricultural Employment Relations Act with the National Labor Relations Act?

A Yes.

MR. McCRORY: Is there a statute marked as an exhibit?

THE CLERK: 2?

MR. McCRORY: Yes, that is what I want.

Q (By Mr. McCrory) Mr. Lubin, let me show you Exhibit 2 which has been submitted by Plaintiffs. Is that the Act we are referring to?

A It appears to be, yes.

Q Going back a minute to your preparation for the trial, have you read any of the regulations of the Board?

A Which Board?

Q The Arizona Agricultural Employment Board.

A Yes.

Q Are you familiar with the procedures under the Arizona Act to establish recognition of the Union's collective bargaining agent?

A Yes.

Q Directing your attention to Section 23-1389 beginning on Page 15.

A I have it.

Q Is that the section that establishes procedures for recognition?

* * *

Q (By Mr. McCrory) Mr. Lubin, could you briefly [319] just outline the procedures under the Arizona Act for obtaining of a secret election for recognition of the Union as bargaining agent?

A A petition has to be filed with a showing of interest, and an investigation is made to check into the good faith of the petition, the showing of interest. A hearing would be scheduled or a consent entered into and ultimately a decision made as to whether or not there should be an election, and then there will be held ultimately a secret ballot election unless the peti- [320] tion is dismissed already. And ultimately after the election is held there will be certification of results.

Q With regard to the procedures from the filing of the petition to the time of the election, are those procedures comparable based upon your experience to the procedures under the National Labor Relations Act?

A In some respects. In terms of timing and the types of procedures that are held, yes, they are comparable.

Q And based upon your study, your legal practice and your experience in dealing with labor relations, the National Labor Relations Board, do you have an opinion as to the practical effects of these required procedures on the amount of time it will take to complete the process from the petition to the date of the election?

A Yes, I do have an opinion.

Q And what is your opinion?

A I would estimate that it would take between six and seven weeks to —

MR. JONES (Interposing): Before the witness answers this is precisely the kind of question I am referring to. He has gone, now, into an area which cannot be related to any experience by Mr. Lubin. [321]

JUDGE MUECKE: I think it would be useful, perhaps, to give the basis of his opinion before he gave an opinion so that we would more clearly understand whether or not the opinion would be otherwise admissible. So when he says he has an opinion it might be useful if you would ask him what is the basis of that opinion, what he has drawn upon to give the opinion you want him to give.

Q Upon what do you base this opinion?

A My opinion is based upon my nine or ten years of experience under the National Labor Relations Act and how long it takes to have an election, how long it takes to complete each step of the process toward the election once the petition is filed, coupled with my understanding of the provisions of the two statutes which, as I have indicated, are similar in that regard.

Q And in your opinion what would be the amount of time that would be necessary to complete this process?

A Roughly six to seven weeks, perhaps a little longer and rarely a little less.

Q Can you now break down that time in terms of the amount of time it would be necessary at various stages of the process, beginning with the first process? [322]

A Okay.

JUDGE MUECKE: And I think it would be useful also, if you did that, to give us specific references to the law which you are talking about. Is that what you are going to do on the different stages?

THE WITNESS: Yes, I am, Your Honor.

JUDGE MUECKE: Okay.

THE WITNESS: Under the National Labor Relations Act or under the Arizona Act, it would be Section 9 of the National Labor Relations Act and Section 23-1389 of the Arizona Act, a petition has to be filed with a showing of interest of support and assuming that that was day one, irrespective of the actual calendar date, the Act charges the agency with investigation and docketing functions prior to scheduling of any hearings. And both statutes, I would assume, are approximately the same in that regard.

Now if the Arizona Board acted expeditiously in making that as another assumption which I am sure they will do, based upon the forty years that the National Labor Relations Board has operated, it takes approximately one to three days to conduct the initial [323] stages of the investigation in order to determine a number of things. First of all, they have to know how many people are employed in the bargaining unit petitioned for. They have to know the names of those employees. They have to check those names with the showing of interest that has been demonstrated by the Union when it files its petition or by the employer that

files its petition or the employee that files it. And they also have to determine that the unit is arguably a unit, that the employer is arguably covered by the statute, and that the unit described in the petition is one that is arguably covered by the statute.

Assuming prompt action this would take between one to three days. At that point a notice of election—a notice of hearing has to be sent out, and generally under the National Labor Relations Act it takes between fourteen and twenty-one days from the filing of the petition to actually holding the first day of the hearing. This requirement would put you down around the fifteenth to eighteenth day if you take the middle of that period for the holding of the first day of hearing. A typical hearing will last between one and two days and that adds another day of time. Under the National Act you have a seven day post hearing briefing requirement, which if the parties ask for it the hearing officer must give. That is not the case under the state law. Under the state law the briefing is discretionary with the hearing officer.

So you may eliminate that seven day period. But there is still a decision making period which has in my experience averaged between ten and fourteen days under the National Act from the date of the hearing to being closed. This is due in part to briefing and in part to the necessity for the transcript to arrive.

JUDGE MUECKE: How many days did you say?

THE WITNESS: Between ten to fourteen days after the hearing closes to a hearing officer's decision or recommended decision as the case may be. Being a pre-election situation, it is a decision of the Regional Director that usually comes out.

Now assuming that an election is directed, under the National Act the Labor Board holds the election between twenty-five and thirty days after deciding —after the date of the direction of that election. This is required because of its requirements for the production of what is known as the Excelsior list or names [325] and addresses of the bargaining employees eligible to vote, which must be in their hands seven days after the hearing—after the decision issues and at least ten days prior to the election being held. So they have just added a few extra days to give the Union an opportunity to use that list and solicit support among the people. And if you add these up you get approximately six and a half weeks to seven and a half weeks.

Now under the state law there is one major differences that adds some time to the short period that I have given you, the six week estimate, and that is that once a notice of hearing is sent out we have the State Administrative Act—Administrative Procedure Act which requires a twenty-day notice of hearing as the minimum notice period unless a statute says otherwise and I do not believe that this statute says otherwise.

And taking that into account I would suggest that under—well, under the National Labor Relations Act, as I am saying, six to seven weeks, under the state

law I would suggest that from the date of petition to the date of election, because of these time frames I would estimate seven weeks.

I guess, Mr. McCrory, I should also add that because of a requirement in Section 23-1389 (I) which is on Pages 17 and 18, even if a decision came down on the day of the hearing you still have a minimum of ten days after that hearing before the election can be held, because this gives the employer by statute ten days to provide the Board and the Union with a list of agricultural employees qualified to vote.

And assuming that that list is used or is designed to be used by the Union as well as the Board in determining the qualification as well as for organizing purposes, and election soliciting purposes, so to speak; assuming another four to five days as a possibly reasonable time after the production of the list, I would suggest that the election could not be held less than two to two and a half weeks after the decision came down here under the state law. And that goes into that seven week calculation, too.

Q How often, in your experience, has the National Labor Relations Board met the time schedule you have outlined in a typical representation case?

A In a litigated case it is rare to meet that time schedule because, one, it is rarer—let me rephrase that. In a litigated case, especially in an industry where you have high turnover amongst employees, it is rare for the Board to meet that kind of a time schedule because the employer knows that turnover will work to his advantage, and therefore time will work to his advantage, and therefore he will try to get—obtain

continuances of hearings, extensions of times on briefs. It is part of the game, so to speak, that is played when you are going through the litigation process.

Q You have testified that time delay would work to the advantage of an employer. Upon what do you base this opinion?

A Upon my experience. I have noticed that in the higher turnover industries, especially—that would be especially true in the lower skilled industries where you have higher turnover—you would find that the longer period of time that elapses from the day a petition is filed until an election is finally scheduled, the more likely it is that the Union will lose the election, primarily because of the fact that most of their supporters are gone by the time the election is actually held.

Q Is there any provision or method which would permit either a Union or employer to obtain an election without complying with these procedures?

A It is not a question of not complying with the procedures. There is a consent procedure that allows the parties to consent or stipulate to an election and that would obviate the need for a hearing and that is found in both statutes, the Federal and the State. [328]

Q And who may invoke the consent procedure?

A It would take an agreement by all parties.

Q Is there a similar consent procedure? You testified there is a similar procedure under the National Labor Relations Act. How does that consent procedure affect the time required from the filing of the petition to the date of election?

A As a practical matter it would not, because one of the—my experience under the National Act has been that in order to obtain a consent and avoid the expense of litigation, a Union will be forced in effect by the employer's demand to go for a longer election campaign period, and in effect you end up with an election date pretty close to what you would have obtained had you gone to a hearing anyway.

Q Mr. Lubin, I show you now Exhibit 1 which is a chart of the seasons for various crops in which the harvest is conducted and workers are employed in harvest operations. Could you briefly examine some of those figures?

A Am I to understand that these numbers are people employed in a given week of a harvest?

Q Yes, they are.

A I have glanced through it.

Q Assuming that it took a three to six week period for the initial organizing prior to the filing of the petition, and based upon your experience in working with the National Labor Relations Board with election procedures, what would be the practical effect of those election procedures and time required to complete them on the holding of an election in seasons such as these?

A It would depend in part on when the organizing drive began. If you are asking me to assume three to six weeks I would have to know when the three weeks began.

Q Assuming at the beginning of the harvest.

A Okay. Looking at the figures in your Plaintiff's Exhibit No. 1, most of your harvest seasons seem to last from approximately four to eight weeks. There are a few of them that are longer than that, but most of them seem to be in that period of time.

Now if the organizing drive began on the first day of the harvest season, it would appear from this chart that it would be impossible to hold an election before the end of the harvest season was well over.

Q And do you have an opinion as to the practical effect of applying such election procedures with the required time to complete them on union organizing activities? [330]

A If we assume that there is a number or are a number of employees still at work, albeit a small one, after the end of the harvest, I would assume that what this would do is result in a very small number or very small percentage of the work force of a given employer making the decision that we bind the employer or lock in the bargaining rights and obligations to cover hundreds of people, possibly thousands.

Q And is there any means by which such an effect could be avoided other than the consent of the grower to waive his rights under the statute?

A I imagine by an amendment to the statute.

Q It has been suggested that perhaps an election could be deferred until the next peak season. Would you have an opinion as to the practical effect of such a procedure?

A It depends on how long a deferral that is. If the season is an annual one it means that the people will lose their bargaining rights for a full year. If the season is twice a year or if there are two harvests a year that means it would pull them back to at least six months.

JUDGE CRAIG: Under the National Act, don't [331]
some unions use a mail ballot?

THE WITNESS: No. The policy of the National Labor Relations Act is against mail ballots. You find that very commonly used in the Railway Labor Act but not under the National Labor Relations Act. I don't know of an election the Labor Board has ever conducted by mail ballot.

JUDGE CRAIG: Don't the Longshoremen use it?

THE WITNESS: I don't believe so. If they are covered by the National Labor Relations Act I doubt that they have.

JUDGE CRAIG: I sat in a case in Oregon last year and that is what they were arguing about. The conduct of the election was done by mail ballot.

THE WITNESS: If it was covered by the Railway Labor Act it would have been done that way. If it is covered by the National Labor Relations Act if that is the way that was done it was a rare case indeed.

JUDGE CRAIG: Do you know if the Longshoremen are under the National Railway Labor Act?

THE WITNESS: Some of them are under it. It depends on what they are loading; if they are loading box cars—

JUDGE CRAIG: Loading on ships—cargo; un- [332]
loading and loading cargo, ships, sea-going vessels.

THE WITNESS: I can check that.

Q (By Mr. McCrory) Based upon your experiences in dealing with organizers and advising them of legal requirements for elections do you have an opinion as to the effect of delays in obtaining the election would have upon their organizing activities?

A Well, yes. Typically delays always result in—not always but generally result in employer victories, although the vote total is for the Union. This is due in part to turnover, in part to frustration, in part to fear, and in part to a loss of interest.

Q Directing your attention to Section 1389(J) Page 18 Lines 14 through 11.

A Lines 14 through 11?

Q Line 4 through 11.

JUDGE KILKENNY: Page again, counsel?

MR. McCRORY: Page 18.

Q Is this the provision which you understood to refer to—to apply to the procedures for decertification election?

A This could be either a decertification or a change in certification.

Q Is this provision similar to the provisions of the [33
National Labor Relations Act?

A No, it is not.

Q And what would be the major difference?

A There is no provision here for a hearing. Under the National Labor Relations Act, whenever any petition is filed there was a provision for a hearing. This specifically omits it from subsection J of Section 23-1389.

Q And do you have an opinion as to the practical effect of such a difference?

A You will have an election very quickly. As a result of an investigation there would be an administrative investigation of a showing of interest, which, as I indicated above, will normally take between one and four days or one and three days assuming prompt action, and an election can be directed in a matter of two weeks.

Q Are there any eligibility requirements under the National Labor Relations Act that you are familiar with?

A I am not sure what you mean by the question.

Q How is the eligibility of a worker to vote in a representation election determined?

A By the National Labor Relations Board applying [3
its view of the statutory definitions as well as its policies developed under the Act.

JUDGE MUECKE: I am sorry, under J of the Act on Page 18, in Exhibit 2. When you said an election would be had quickly in two weeks, were you referring to the effect of that section?

THE WITNESS: Yes.

Q (By Mr. McCrory) Mr. Lubin, referring again to Section J, that does apply, in your opinion, to only the decertification or change of certification rather than recognition.

A As opposed to the filing of a petition for certification in the first instance, this one specifically relates to a situation where you already have a certification in existence, yes.

Q Directing your attention now to Section 23-1382-1 which is on Page 22, Lines 22 to 27.

A You want me to just look at the last five lines of the Section, is that what you are asking?

I am sorry. I am on Page 3.

The definition of "Agricultural employee"?

Q Yes.

A Okay. Which lines, again?

Q Lines 22 to 27.

A I have it.

[335]

Q If that section establishes a requirement that in order to vote in a representation election under the Arizona Agricultural Employment Relations Act, a person must be at least sixteen years of age, would there be any comparable provision in the National Labor Relations Act?

A No.

Q Do you know if there are any situations where persons under sixteen have been permitted to vote under the National Labor Relations Act?

A I know that the Board in its administration of the Act does not put an age requirement in any of its decisions and if there are people employed at a given location who are under the age of sixteen, and who meet the tests set out in that decision for eligibility, that is belonging in the bargaining unit and basically a permanent employee, et cetera, they will be eligibile to vote.

JUDGE CRAIG: Is there a child labor law in Arizona that has some effect on this?

THE WITNESS: The child labor law in Arizona I believe exempts agriculture from its coverage.

JUDGE CRAIG: What is the age limit on child labor?

THE WITNESS: I think it is sixteen. It may be fourteen. I haven't looked at it in quite a while.

JUDGE CRAIG: Thank you. [33

Q (By Mr. McCrory) Directing your attention again back to the section on elections, Section 1389(D) on Page 16, Lines 27 to 33.

A I am sorry, what page?

Q Page 16.

A Lines 27 to 33?

Q Yes.

A I have it.

Q And is this provision that you understand to apply to the procedures for a runoff election?

A Those are the procedures applying to a runoff election under the State Act, yes.

Q Assuming in the intial representation election there are three choices on the ballot, two unions and no union and none of those choices reaches a fifty per cent majority so that a representation election was necessary—a runoff election would be necessary.

A That is what this provision takes in.

Q And if this section requires in any election the voter shall be afforded a choice of no union and that applies to a runoff election, is there any comparable provision in the National Labor Relations Act?

A This is different than the comparable situation in the National Labor Relations Act. Under the National Labor Relations Act the top two choices appear on the runoff.

Q Do you have an opinion as to the practical effect of a provision which required no union on any runoff ballot regardless of its votes in the previous election? [337]

A Yes. It could in some circumstances allow a number of employees—say you have a hundred employees in a bargaining unit that are eligible to vote and they all vote, two of them can determine the choice of the other ninety-eight by voting for no union and if the other two unions split the remaining votes or even if it is fifty to forty-eight and two for no union, the fifty and the two will appear on the ballot rather than the fifty and the forty-eight.

This, of course, would only apply if the two was the no union. If one union received two, they don't get a second shot.

Q Is there a procedure under the National Labor Relations Act whereby a union may be recognized as a bargaining agent for the—exclusive bargaining agent for the majority of employees where it has not won a secret ballot election?

A May be certified?

Q May be recognized.

A Recognized, yes. Certified, no.

Q And a bargaining order may be issued in such circumstances ordering bargaining between a union and an employee.

A Despite the lack of a certification.

Q Despite the lack of winning a secret ballot election?

A That is correct. Bargaining orders can issue under the National Act without the need for certification.

Q And based upon your experience what sort of situations would be involved in these cases?

Q The vast majority of the cases where this happens is because of very serious unfair labor practices by the employer which has made it impossible for the Union to win a fair labor election review of the Board.

Q And could you briefly describe what you mean by the unfair labor practices.

A Unfair labor practices being acts or actions engaged in by an employer which are prohibited by Section 8 of the National Labor Relations Act.

Q Would you give me any examples based upon your own experience as to the types of acts that would create such a situation?

A Sure. Discharge of Union adherents; threats to discharge; giving of raises if people would vote no in order to induce people to vote no; illegal threats of closing the plant or moving if the Union comes in. [339]

These are just a small—the range of illegal conduct can be as wide as the imagination of an employer who wants to violate the law.

Q And based upon your experiences would you have an opinion as to the practical effect if the Arizona Agricultural Employment Relations Act had a provision which prohibited any such bargaining order absent the winning of a secret ballot election?

A It would have the effect of making it profitable in many cases for the employer to violate the law so long as he was willing to in a sense pay the price of having repeated elections, because the worst thing that could happen to him is that the Board would order repeated elections. In effect it would create a license to the employer who wants to violate the law.

Q Referring to Page 10 Lines 2 through 6, Section 1385 (C)—

JUDGE KILKENNY: Page 10?

MR. McCRORY: Page 10.

Q Section C begins on Page 9:

A Which lines do you want me to read? [340]

Q Lines 2 through 6. And if you would also look at the Page 9, beginning of Section C.

JUDGE MUECKE: Look at 9 what?

MR. McCRORY: The beginning of Section C. It starts on Page 9.

THE WITNESS: I have read it.

Q Referring specifically to Lines 2 through 6 at Page 10, is there any similar provision in the National Labor Relations Act?

A There is not.

Q Do you have an opinion as to the practical effect of the difference between these two statutes?

A It is very common for employers and unions to make predictions regarding existing or proposed conditions of employment or continued operations in election campaigns, and what this section is doing is, it makes it impossible for the Board to hold that some of the predictions may have gone too far and constituted a threat of plant closure or a threat of termination of everybody's employment if the Union should win the election, things of that kind, which the National Board has ruled are improper.

Q And referring specifically now to Lines 6 through 12 of the same section, the same page. [341]

JUDGE MUECKE: What lines?

MR. McCRORY: Lines 6 through 12, the next sentence.

A I have got it.

Q Is there any comparable provision in the National Labor Relations Act?

A No.

Q And what, based upon your experience, would be the practical effect of the difference between these two statutes?

A This would make it impossible under any circumstances — absent the approval of the employer or the grower — for the Union to have access to the workers on the property in order to communicate with its membership.

MR. JONES: I would like to object to that and move his answer be stricken. He has given strictly an opinion involving interpretation of the wording of this statute. It is not related to anything else, either under the National Statute or his experience.

JUDGE MUECKE: Well, perhaps if we were to have you phrase it that you assume that the words here — let's see — we did this earlier, if you recall. Then we can argue about the significance of that, whether when he says that this means this portion here:

> "... no labor organization shall be required to furnish or make available to an employer, materials, information, time or facilities to enable such employer or labor organization as the case may be, to communicate with employees of the employer" ... and so forth.

You are asking him to assume that that means, those words, that the Union cannot have access to the employer's premises.

Would that be a correct statement of your interpretation of the law?

MR. McCRORY: Yes.

JUDGE MUECKE: All right. Now I think then you will argue that is not correct, but if that be correct, what would be, then, the effect of that on whatever he wishes to say?

MR. JONES: My objection was he asked the witness what it meant.

JUDGE MUECKE: I agree with you, that is why I asked him to reword it.

THE WITNESS: Your Honor, what that would do — the difference between this and the National Act is that under the National Act, for example, when you have isolated property or inability to reasonably expect an organization to be able to communicate with employees of the employer when a petition is pending, the Board has the authority to direct the employer to allow the Union on the property to organize during off work hours and in off work areas. And what this is, I believe, is a statutory statement by the legislature that they don't like that rule.

JUDGE MUECKE: Well, you were asked to assume that that is the effect of it.

THE WITNESS: That is correct. Assuming that that is what this means, that is the effect of it.

Q (By Mr. McCrory) Directing your attention now to Section 1384, Page 5, Lines 13 through 31.

A I have it now.

Q Is there any comparable provision in the National Labor Relations Act?

A No.

Q Assuming that the rights reserved to the employer as specified in Sections 1, 2, 4, and 5 were topics that could not be bargained about by a Union, what would be the practical effect of the exclusion of such topics from the bargaining table?

A Assuming that these were not negotiable?

Q Assuming these were not negotiable.

A The effect would severely limit the scope of any contracts that a Union could insist upon with that employer, because it could not then cover — it could not require the employer to bargain about the topics, therefore the employer can just sit there close-mouthed and refuse to talk about it and the Union could not do anything about it. [344]

Q Looking first to Section 1, Line 16, assuming that the items specified in that section were excluded from the bargaining process, based upon your experience what would the effect be upon Union organizers and Union activities?

A It would inhibit a Union in its ability to adequately represent employees which in effect would tend to create a more apathetic feeling among the employees who would be more inclined to say what is

the use, you can't do anything for me anyway. And this would tend to deny them of their organizational rights.

Q In your experiences in both directly participating in collective bargaining negotiations and advising unions and your familiarity with the area, what sort of topics would be — what sort of situations would be effected by the exclusion of these topics?

A Perhaps I better first say what I generally view as included.

Based upon the National Labor Relations Act and my activities operating with unions that are covered by it, typically they can negotiate about anything that affects their working conditions.

The phrase, I guess, in the Statute is: wages, hours and terms and conditions of employment.

That is very, very broadly defined by the National Labor Relations Board and it would cover a wide range of topics. Making the assumptions that you have given me, if these topics here are non-negotiable, this would eliminate a large number of areas of interest to the employees from the bargaining table. For example, the time to report to work might even be eliminated if you read it the way you are suggesting in your question.

I can go through and give you a lot more in terms of examples, but basically it would very severely limit the range of negotiations that a union could engage in on behalf of their covered employees in the bargaining unit.

* * *

Q (By Mr. McCrory) Looking at subsection 1, which refers to methods of carrying on any operations, and assuming that that is to be excluded from bargaining, what I wish to know is, based upon your experiences in bargaining situations would such a phrase involve topics that directly affect employees? [350]

JUDGE MUECKE: Your answer to that would be yes and presumably you would tell us what the basis of your opinion is and so forth.

THE WITNESS: Yes. In the situations, for example, where I have negotiated for organizations, we frequently will attempt to bargain about matters such as how a task will be performed, be it by hand or with the use of equipment or how — what kind of work practices should be engaged in by the work crew. [351]

If we felt it important enough, for example, we may not like the particular practice that a particular employer is engaging in with respect to that, we might try to change it through negotiation. And being that it is a term and condition of employment, under Section 8(A)(5) of the National Labor Relations Act the employer is bound to bargain about it. It is a mandatory topic.

If you take the assumption that you have read to me, that is that this section excludes it from bargaining, then I would say that it would have a dramatic effect on that aspect of the kinds of demands that a union can place on the bargaining table.

Q Looking at the next line, it refers to the size and makeup of crews and assignment of work.

JUDGE MUECKE: Excuse me, before you get to that — and would it be accurate to say that your comments related to methods of carrying on any operation or practices thereon? That is what you were commenting on?

THE WITNESS: Yes, that is what I understand the question to relate to.

JUDGE MUECKE: He had asked you the whole [3
of Paragraph 1.

THE WITNESS: I am sorry. I thought he was talking only about the methods of carrying on operation.

JUDGE MUECKE: Okay.

JUDGE KILKENNY: It has been limited.

JUDGE MUECKE: Thank you.

Q (By Mr. McCrory) Proceedings now to Line 19 where it refers — The same subsection 1 refers to the size, makeups of crews and assignment of work. Are these topics that have, in your experience, come up in a manner which directly affects employees and unions in bargaining situations?

A Oh, daily. Assignments of work is the kind of thing that you run into on a daily basis. That is the basic supervisory relationship that you are talking about there, and who can do a certain job is one of the biggest topics of negotiation, particularly in the building trades industry, in the construction industry trade and to a lesser extent elsewhere. But you also have it in your other industries: auto, steel. Who will do a particular job, what shall that person be paid when they do that job. If a person is a light machine operator and is assigned to work a heavy machine, under what conditions can he do it. Can he do it at all, and if so, what will he be paid when he does it.

In terms of the size and makeup of crews you [353]
run into the same kinds of questions. Is this a job that should be done by five people or six people. How much production should a five man crew be expected to produce. How much production should a six man crew be expected to produce. This is very common, and it goes almost to the core of the entire agreement other than the basic pay scale.

Q And in your opinion if such topics were excluded from bargaining sessions and a union was not permitted to bargain concerning these topics, what effect would that have upon union activities and union organizing?

A Well, it would — the employees would become more questioning of the benefits that they can obtain by joining a union: what good can you do for me; you can't talk about how many people do how much; they can still force me to do all this kind of extra work; you can't do anything about it. They become more and more apathetic, more and more apprehensive, and

wonder whether it is really worth it at all, and they would tend not to associate with fellow employees who might want to belong to the union.

Q Going next to subsection 2, which states: to hire, suspend, discharge or transfer employees in accordance with his — referring to the employer — judgment of their ability.

Taking that subsection, are those topics that, based upon your experience, would directly affect presently employed workers?

A Not so much the hiring, because that is a matter that is traditionally left solely to the employer in terms of judgment and ability. But with the exception of if he refuses to hire for engaging in union activity.

But putting that problem aside, with respect to the suspension, discharge or transfer, again you find this kind of a provision is typically found in grievance procedures in connection with the rights of an employer to discharge; whether or not he has to give warnings before he actually discharges, how many warnings. Progressive discipline questions are involved here, and these are all negotiable matters under the National Act and they are frequently found in contracts. Unions always insist upon some kind of a system that would protect what they perceive to be the rights of their membership and the employees they negotiate for.

Q And do you have an opinion as to whether the exclusion — if these subjects were excluded from collective bargaining what the effect of that exclusion would be?

A If would be the same as I indicated above; more strongly, though, because this is an area that is even more basic. This is probably the second most important item in a contract after wages and economic conditions. We are talking here about job security.

Q Going back, now, to the election section, please turn to Page 16 Line 1.

A This is the section dealing with the investigation and holding of hearings.

Q Yes, it is.

A I have it in front of me.

Q You have testified that you understand that under the Arizona Agricultural Employment Relations Act the preliminary procedure would require first the investigation of petition and second, a hearing. What I would like to know is: is this the section upon which you base those statements?

A In part, section C to me requires a hearing, a notice of hearing and an investigation prior to that.

Section D discusses what happens after the [356]
hearing is held. Direction of election should issue unless the petition is dismissed, and that is found lower down in the same page at Line 19. And Section H specifically calls for the allowance of entering into stipulations for consent elections and waiver of hearings.

Reading those three sections I believe that a hearing is required prior to the holding of an election unless there is a waiver. Except in the circumstances

covered by J, which deals with the decertification type arrangeent which we discussed earlier, because that sets out a different procedure.

Q With respect to just the sections that deal with the hearing procedure, is there similar language in the National Labor Relations Act?

A It is laid out in a different order, but the word for word language is virtually the same. There may be one word difference, but I don't think it is different in any way.

Q Based upon your years of experience with the National Labor Relations Board, has the identical language in the National Labor Relations Act always been interpreted to require both the investigation and the pre-election hearing?

A I can't speak for others, but I have always interpreted it that way. [357]

Q You mentioned sub-section J was different, that that refers to decertification process.

A Yes.

Q Could you explain what the difference is?

A Well, the petitions contemplate — the procedures contemplated by C talks about two kinds of petitions: a petition by an employee or a union or a group of employees who are asking to have a union certified, or a petition by an employer asking to have a union either certified or not certified. That is C-1 and C-2. And in such a case hearings are required as I have just indicated—at least in my view.

Now J deals with the situation where there is a union certified or there is an agreement with a union and an employer covering a certain group of employees and these employees or a certain number of them decide they want to get rid of that union, either replace it with another one or have no union. In such circumstances that is the one covered by J and in such a circumstance they specifically omitted from there a hearing requirement, and in fact the Statute says that as soon as such a petition is filed covered by the language of J, the Board shall conduct an election. It talks about an immediate election.

Q Assuming that sub-section J provides for a decertification of a union, based upon a thirty per cent showing on a petition, without a requirement for a hearing and it permits a fairly rapid election, what would be the practical effect of such a procedure on an existing union? [358]

A Well, it would allow — of course the employer can choose his time for filing. He can do it during a very slack season, have a fast election while he has very carefully selected people at work before the influx of the harvest crop before the influx of employees needed for the harvest, and get rid of the union even though a vast majority of his potential employees may really still prefer one and destroy a union in effect — at that location or for that employer.

* * *

Q With regard to subsection (F), the final sentence states that such a petition shall not act to stay the election proceeding. [361]

Would such a provision, such as (F), affect the time table that you had outlined previously in your testimony?

A No.

Q And why is that?

A Well, because it will not stay the proceedings. In addition, this covers a rather narrow area. We are talking about how the cards were obtained, and that is the only area this covers. It doesn't deal with the other challenges to the petition that the employer may raise. For example, if he wants to question the description of a unit or his own coverage by the statute, or anything that deals with any topics other than the three or four mentioned in subsection (F), he would have to go the regular route and litigate it in that fashion and those proceedings, of course, do effectively stay the election.

Q Could you briefly describe the topics other than those included in (F) which are generally litigated and give an idea of how — what percentage of these would be raised in pre-election hearings.

A Percentages are impossible to give you, because every topic can be raised and depending on the facts of every case they are raised or not raised but the topics that are generally raised in pre-election matters are as follows: first, whether or not the employer is covered by the statute. On rare occasions somebody may even raise whether or not the union is a union within the meaning of the statute. That one I can say is very rare.

But in addition, you will have what should a unit be, should it be bigger than the unit petitioned for or should it be smaller or should it be bigger in some respects, smaller in others. What classes of em-

ployees are eligible to vote, and what classes are not eligible to vote. Where should the election be held, on the property, off the property; during working hours, before working hours, when shall it be held. Shall it be held in an office, out in the field somewhere, or in the working areas or what.

Questions such as supervisory status of various individuals will be raised, questions such as whether certain individuals are confidential and therefore should be excluded are raised; managerial questions; questions whether certain people belong in one unit as opposed to a different unit are raised. All of these things can come into a pre-election hearing.

Q And is it your testimony that all these issues must be decided at a pre-election hearing before the order directing an election under the National Labor Relations Act? [363]

A Most of them must. Occasionally the Board will duck an issue and leave it for post-election hearing, but unless there is an agreement reached most of those must be decided, yes.

* * *

Q (By Mr. McCrory) I would like to direct your attention to Page 26 Line 8 through 30.

JUDGE MUECKE: 31 or 30? [364]

MR. McCRORY: Line 30, subsection (B) of 1393.

A I have read it.

Q What is your understanding of this section?

A Authorizes and clears in certain circumstances to obtain temporary restraining orders and injunctions from court of competent jurisdiction which would be superior courts.

Q And in what circumstances do you understand that this procedure would be invoked?

A Well, there are two separate times that this talks about, two different kinds of orders that are sought: one for each circumstance. In one case a ten day restraining order can be granted if there is any strike or threat of a strike or boycott by a union against an agricultural employer. That is one situation.

The second situation is if the employer believes that a strike is unlawful, then they can get a more permanent kind of an injunction.

Q Staying just for the moment with the first situation and assuming that the Act provides that a strike by farm workers may be enjoined for ten days at the request of a grower, is there any similar provision in the National Labor Relations Act?

A Not at the request of the grower, no. There is no [365]
single provision, or of any employer, for that matter.

Q What would be the practical effect of such a provision?

A Well—

MR. JONES: Let me raise this objection to the question. The provision really goes to the agriculatural industry. The question as raised relates to the National Labor Relations Act. Unless he can relate it somehow to a similar industry it has no relevancy at all, it is unrelated, really.

JUDGE MUECKE: Okay. The record may so show. Go ahead. If you are correct we will disregard it and strike it and you can so argue. Go ahead.

A Under this Act whenever any union decides to strike or threatens to strike or engages in a strike, or boycotts, even if it is lawful the agricultural employer can obtain by a proper application to the court a ten-day restraining order enjoining that strike or boycott.

As a condition of doing so he must agree to arbitrate the dispute that gave rise to the threatened strike or boycott.

Now under the National Act that is not the case, and it is not the case in any industry covered by the [366]
National Act, that an employer can do this. Even in industry, for example, packing of food, which is covered by the National Act, the same provisions apply there as do in the rest of the law despite the fact that they are dealing with perishables there.

Now so long as he is willing to put up with that ten day — with the requirement that he arbitrate, he can obtain that ten day injunction, so to speak.

What this will do is, it gives the employer an option. If the employer thinks that the strike is ineffective he will just let the strike go on and take whatever punishment is meted out as a result of that strike — which he obviously will think is minimal or at least that he can live with.

If on the other hand he feels that the strike is effective and is hurting his operation, at his own option he can then go out and get an injunction stopping it.

Typically, in our history, we used to have a lot of injunctions and strikes and that is one of the things that, you know, the Norris-LaGuardia and other statutes have avoided, have stopped. They have let the economics of the Union versus Management issue resolve itself except when there is a national emergency in which case under certain procedures the Government can impose a sixty day cooling off period. But [367] that requires findings by the Government officials of a national emergency. There is no such finding here. At his own whim the employer makes his own decision in his own way based upon his own calculations and his own feelings and his own fears.

* * *

Q You were asked several questions by Mr. Jones, [462] concerning the provision regarding the use of employer facilities on Page 10 the last sentence, sub-section (C).

A Yes.

Q Assuming that we are dealing with an employer, an agricultural employer who has no farm labor camp, that that is simply not in the picture and has nothing to do with the operation of this section and this hypothetical. Would you still have any problems with the sentence?

A I have problems with that sentence for a number of reasons. I believe that that sentence expressly prohibits the Board from issuing an order under any circumstances requiring access to the employer's facilities.

Whether or not you apply the word "facility" to apply to farm labor camps or just to the farm itself and to the areas of farming, packing, et cetera, is not [463] controlling in my analysis because even if they have access to the camp there may still be circumstances under which they should still have access to the remaining facilities on limited occasions. I believe that this is a direct attempt by the legislature to overrule, so far as this statute is concerned, what the National Labor Relations Board and the courts have done in connection with allowing access by labor organizations for organizational purposes on somewhat well defined albeit limited grounds.

Q And based upon your experience are there circumstances under the National Labor Relations Act when use of employer facilities are necessary for an organizing campaign?

A Yes. You have situations in some cases the employees live there as in a case involving Grossingers of New York where access was granted because the employees virtually spent a full twenty-four hour day seven days a week on the property.

Then you have additional cases; I think the case was Babcock and Wilcox, I am not quite sure of the name, in which for some period of time now that has been the law, which states in effect in remote areas diverse employees living over a wide area traveling dis-

tances, and there are factors set out which basically go [464]
to the question of can a union have an alternate means and if the Board finds that they do not have a reasonably alternate means of communicating with the bargaining unit employees they will require the employer to give that union access to the property so long as it will not interfere with the operations going on on behalf of the employer.

* * *

Q (By Mr. McCrory) Directing your attention to [465]
the stipulation and Paragraph 4(b) on Page 3, this is the stipulated statement of Board actions.

A I have it in front of me.

Q Would you compare the experience as set forth in these situations where an election was contested with the election situation in Paragraph 4(a) that was shown you by Mr. Jones?

A 4(b) is part of the overall four and it deals with Bodine Produce Fresh Vegetables and Potato Farms and going into 4(c) it appears that this case was filed, a petition was filed on November 12 and a hearing was held on one particular question. That is whether or not Bodine was an employer of the petition for employees and that hearing was scheduled on the 25th of November which is thirteen days after the petition [46
was filed. Then a decision issued sometime around — between the 25th of November and the 5th of December.

Notice of that decision was mailed out, if I understood it, on the 5th day of December, making a determination that they were an employer and directing further proceedings, and to determine whether or not there was a showing of interest and whether or not an order for an election should issue.

That occurred a day later and the election was scheduled, as I understand it — I am not sure an election was ever scheduled. Certainly it was not held because the petition was withdrawn, but even looking at that, that was the only case that was even pending for hearing. This is a one time case which occurred — this is the only case pending before the Board. There were two or three cases consolidated and that was it, and it still took them something like four or five weeks, rather, to remand the case back to first find out whether or not there was a showing of interest sufficient to justify the holding of an election and who knows how long the proceeding would have gone on had the petition not been withdrawn.

Q And directing your attention to Paragraph 5 on [467]
the next page, Page 4, would you likewise compare that case with the ones you have described?

A Well, this of course was that consent case at Cactus that we discussed earlier. Again the petition was withdrawn although the election was scheduled. The comparison to me is that you have a situation with only five or six petitions pending, total, and yet it still took the Board something like four weeks, a rather simple one-day hearing, to determine the question and then they remanded it back for further proceedings.

It indicates to me that if the Act started getting used they would get bogged down pretty quickly and I think that even my estimate of six or seven weeks might be generous on behalf of the speed with which the Board seems to be able to work based on this very limited experience they had.

Q Referring again to Paragraph 5, there is approximately a two week period between the decision and time an election was scheduled although that election was never held. Do you have any reason to believe that any part of this period was due to the providing of a list as provided in subsection (I) which we were discussing earlier?

A If you look at the back of exhibits — I think it is [468]
Exhibit 5 which is attached to this stipulation, the order of December 4 issued by the Board and directing the election, indicated that there were no issues at that hearing other than the showing of interest at Cactus, and they directed — they held a hearing to determine the validity of that showing of interest where they made a decision regarding the showing of interest, found it valid, and then said there were no other issues so they closed the hearing and ordered an election to he held on the 17th day of December. They then ordered the list to be produced by the 16th day of December, which was twelve days, not ten, after the decision issued.

I don't know if that is because of an intervening weekend or not. But it is twelve days rather than ten. It gave the union one day to have the list in its hands, in effect, prior to the election.

Q Going back to Paragraph 4(b) which you described—

A I have it.

Q From the time of filing the petition on November 12 to the time of the decision, assuming that the Board had proceeded to order an election, what would be the minimal time from December 5th that such an election could be ordered, in your opinion?

A The minimum time would have been sometime [469]
after the 15th day of December and that would have been another then days. In my view, though, the minimum time would have been around the 20th of December, because I believe that the intent of 1389(I) is to allow the union to have that list for a few days.

* * *

EXCERPTS FROM TESTIMONY OF JAMES CHERRY

Q All right. Now let's assume, then, that under the [577]
State statute, after the petition is filed on the first day and forwarded to the employer, you would receive it at the latest, say, on the fourth day; maybe earlier if it is hand delivered. A notice is included with the petition setting a date for a hearing under the State Statute and let' assume further that that hearing is scheduled [578]
for the eighth day which would be the following Monday.

Now is there anything that you have seen or been able to detect in the State Statute or its regulatory scheme which would prohibit fowarding that notice and setting that hearing eight days following the filing of the petition?

A No. There is nothing in there that would inhibit that sort of action.

Q Moving, then, to the Federal sector, Mr. Cherry, when the initial letter goes out and an informal conference is scheduled, what takes place in that informal conference, generally speaking? What is the purpose for it?

A Well, generally the showing of interest is checked by the Board agent. That is, the employer in the initial letter is requested to bring a list of the employees in the unit described in the petition, and he brings that to the informal conference and the Board agent will excuse himself from the informal conference and check the list, check the cards from the employer's list, and if it has a thirty per cent showing of interest he merely tells the parties that they have an adequate showing of interest. The employer is not permitted to know who [57
signs the cards and for that reason he is not given any figures as to what the check shows. But it is the same thirty per cent required by the Board as required by the State — by the Federal Board as for the State Board.

Q Under the State law it is correct, is it not, that there is no informal conference referred to or called for in the regulations or the Statute as far as you can tell?

A Well, I think it is an informal conference; they call it a hearing.

Q All right, let's come to that. The hearing is the event which I referred to in my hypothetical as having been scheduled for the eighth day. Let's assume that the parties have been notified and they are now convened for that hearing.

You testified that the filing of the petition raises the question of representation. Would it be possible under the State Statute in that hearing for the hearing officer, whoever it is, to commence the hearing and then make the administrative check — obviously outside the presence of the employer — of the cards against the list at the time that hearing has commenced? Would that be possible under the State Act?

A Oh yes, definitely. [580]

Q Let me ask you, do you have the Statute in front of you?

A Yes.

Q Would you refer to Section 1389 D?

JUDGE CRAIG: What page?

MR. JONES: Page 16.

Q For the record, Mr. Cherry is using his copy of the Statute and the pagination is a little different. It is the same statute.

A Section D?

Q Yes. I am going to refer you to the first sentence commencing "If the Board finds —" Do you have that?

A Yes.

Q The first part of the first sentence is all, which reads as follows:

"If the Board finds upon the record of such hearing that a question of representation exists, it shall direct an election."

Now within the framework of that statutory language, assuming the Board has made its check in that hearing of the showing of interest, is there any reason why it could not come in and at the commencement of [58] that hearing announce on the record that a showing had been made and that hearing announce on the record that a showing had been made and that a question of representation did exist and at that very moment set the date for an election?

A Well, there is nothing; as I read the section they could direct an election even though there may be objections to the validity of the cards presented by the Union. Or the authenticity of them. Or as to whether there is a unit problem or many other problems, and they could direct an election even though there are those problems that would have to be resolved, eventually.

Q And there are specific provisions, for example, on the challenge to the cards which say that a challenge will not stay the date of an election, isn't that correct?

A That such challenges will not stay the election, that is correct.

* * *

Q (By Mr. Jones) Would it be possible for the [584] Board to proceed to do anything else after directing an election? If so, what would that be? With respect to these other issues.

A Well, they could have a hearing later on concerning the other issues and then make a determination.

* * *

Q Has there been any experience, Mr. Cherry, into [588] the National Labor Relations Act in handling elections [589] in seasonal industries where postponements are necessary by reason of losing peak employment?

A Oh yes, we have held many elections that way, particularly in this area in the southwest part of the country.

Q What are some of the industries or what are some of the contexts in which this has been done?

A Well — produce.

MR. McCRORY: Excuse me. I would like to object on the ground foundation hasn't been laid as to Mr. Cherry's experience in this area and at what time starting his Board experience he has dealt with agriculture.

JUDGE MUECKE: Would you ask him that.

Q Have you personally, Mr. Cherry, in your responsibilities with the National Labor Relations Board been involved in or do you have knowledge of the procedures that have been used and applied by the National Labor Relations Board in holding postponed elections in seasonal industries?

A Oh, yes. I have supervised them. I have handled them personally.

Q Give us, then, would you please, some indication as to the nature of the employment involved, what [590] kind of work are the people doing?

A Well, we in the year past, when the farmer or the agricultural people were using brokers to harvest their crops, the NLRB took jurisdiction of your packing house people even to the extent of the lettuce people going into the fields and harvesting the lettuce where they were harvesting some crops that they didn't grow.

In other words, the broker was harvesting the farmers' crops and he would go from one farm to another harvesting their crops. Well, that crew under the National Act are covered and we conducted such elections in those industries.

Q Tell us how you would do that. Procedurally, what would happen?

A Well, they would file a petition and if we —

MR. McCRORY: Mr. Cherry.

THE WITNESS: Pardon me.

MR. McCRORY: May we also have some foundation as to the time period that we are talking about and as to how recent these experiences are.

JUDGE MUECKE: Yes. Time and place.

MR. JONES: I couldn't see it was that important.

Q Can you tell us generally when these elections occurred that you are referring to. [591]

A Well, they occurred some time between 1956 and 1973.

Q Can you be more specific than that?

A I sure couldn't.

JUDGE MUECKE: You mean it was just one time.

THE WITNESS: Oh no, no. No, we have had many cases where we have had to have postponed elections because they didn't have any employees.

JUDGE MUECKE: No, no. The question he has been asking about is packing shed employees in seasonal work.

THE WITNESS: This would be a seasonal industry, where they don't have any employees. They had them at the time they filed the petition, but by the time we get ready to set up an election they don't have any employees. So this could be in areas other than — or the same principles applied in the areas other than farm produce situations. Such as I would say a new plant where they have hired, say, fifty employees, and the Union files a petition for an election and the employer comes in and says: well, in a month and a half we are going to have two hundred employees.

Normally we would set up an election for two months hence or just put this petition in the icebox and hold it for that time. But very often we have held [592] consent elections a month, two months, three — six months in advance.

Q Later?

A (Continuing) — away.

JUDGE MUECKE: Consent elections?

THE WITNESS: Sir?

JUDGE MUECKE: Consent?

THE WITNESS: Yes. Well, the Board is governed by a decision too, sir. When the Board used to handle decisions and in recent years in the last ten, fifteen years or thereabouts the Regional Directors have directed most of your elections and directed most of the orders for election. But the Board itself in years past would conduct elections in seasonal industry and direct that an election would be held at the peak of employment of the next seasonal crop.

Q Which could mean any?

A Six months, nine months, something of that kind. Sometimes three months. Or whatever.

Q Going back, then, to my earlier question as to how this is done procedurally, could you tell us what happens when the petition is filed? How is the determination made and what do you do procedurally? For example with such things as the showing of interest the eligibility list; could you just describe that for us? [593]

A Well, where you have got the seasonal industry and you say a petition is filed for an election in a group of, say, packing shed workers, there is fifty employees there and the employer comes in and says, well, in ten days we are going to be out of business, we will be through. And the Union says, well, we thought you would be there longer than that, but okay, there is no argument. You don't get any arguments in situations of that kind, because the Unions know that the

employers know how long they are going to pack and they very often reach consent agreements at that time that the Regional Director will direct when the election is to be held. And the employer and the Union would then report to the Board when their next peak period of employment comes.

JUDGE MUECKE: Regardless of whether or not they are the same employees.

THE WITNESS: That is right, and the showing of interest would be that of the time of the filing of the original petition. There wouldn't be a new check then, showing of interest.

Q No new showing of interest would be required?

A No new showing of interest under those circumstances would be required.

Q What about the eligibility of employees? When would eligibility be determined for purpose of voting in the election? [594]

A The payroll period immediately preceding the date of the election would be your eligibility date, so it would have nothing to do with the original time. That is, filing the original petition.

Q Now Mr. Cherry, my question is this. Have you been able to determine, detect or see any provision in the Arizona Statute which would prohibit or impair this kind of procedure from being used or utilized in the event of need?

A No, there is nothing in this Statute that would prevent that sort of thing. There is nothing in there concerning that at all.

* * *

Q Mr. Cherry, very briefly I understood the reason you testified that under the State Act elections can go rather quickly is because there is no need to determine the issues of unit appropriateness and so on prior to the holding of the election, is that correct? [670]

A That is correct. Your problems and issues can be resolved after the election has been held. [671]

* * *

FILED APR 20 1978
W. J. Furstenau, Clerk United States District Court For The District Of Arizona
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

UNITED FARM WORKERS NATIONAL UNION on behalf of itself and its members, et al., *Plaintiffs,* vs. BRUCE BABBITT, Governor of the State of Arizona, et al., *Defendants,* ARIZONA FARM BUREAU FEDERATION, an Arizona corporation, et al., *Intervenors.*	NO. CIV 72-445 PHX CAM OPINION AND ORDER

Before KILKENNY, Circuit Judge, CRAIG and MUECKE, District Judges

MUECKE, District Judge:

STATEMENT OF THE CASE

Plaintiffs filed this action for declaratory and injunctive relief together with an application for a three-judge court under the provisions of 28 U.S.C. § 1343, 42 U.S.C. § 1983, and 28 U.S.C. § 2201, et seq., seek-

ing to have Arizona's Agricultural Employment Relations Act (AERA), A.R.S. §§ 23-1381, et seq., declared unconstitutional.

Plaintiffs in this action are the United Farm Workers National Union (U.F.W.), on behalf of itself and its members; Gustavo Gutierrez, an agent of the U.F.W. in the State of Arizona; Ruben Alaniz and Matilda Varela, farm workers, on behalf of themselves and all other farm workers; and Wendy Rose, an individual supporter of the U.F.W., on behalf of herself and all other similarly situated U.F.W. supporters.

Defendants are Bruce Babbitt, Governor of the State of Arizona; Jack La Sotta, Acting Attorney General; Bert Fleming, Treasurer; Raymond Long, Finance Commissioner; Gene Blake, William S. Borce, Jack Montgomery, Keith Walton, Jack McManus, Milton G. Sanders, individually and as members of the Arizona Agricultural Relations Board; and Theresa Bond, in her capacity as Executive Secretary of the Board.

The Arizona Farm Bureau Federation, the Arizona Grape Growers Association, the Vegetable Growers Association, all being Arizona corporations; and the Yuma Citrus Shipper's Association, and unincorporated association, all sought and were granted invervention in the suit on November 5, 1973.

Plaintiffs ask this Court to find that the Agricultural Employment Relations Act (AERA) violates the constitutional rights of the plaintiff U.F.W. and its members by restricting the exercise of their constitutional rights in several broad areas.

Provisions of the United States Constitution which plaintiffs claim are violated by the Act are the First and Fourteenth Amendments with respect to specific provisions of the Act, which provisions it is alleged violate freedom of speech and assembly and the due process and equal protection clauses of the Constitution.

In particular, plaintiffs' arguments deal with nine separate issues and at least as many provisions of the AERA in support of their contention that the AERA is unconstitutional. Those issues and the statutory provisions dealt with are: (1) A.R.S. § 23-1385(B)(6) and (7) [generally dealing with secondary boycotts as an unfair labor practice]; (2) A.R.S. § 23-1385(B)(8) [publicity directed at the ultimate consumer regarding nonuse of agricultural product as an unfair labor practice]; (3) A.R.S. § 23-1385(B)(12) [recognitional picketing as an unfair labor practice]; (4) A.R.S. § 23-1389 [employee representation and election procedures]; (5) A.R.S. § 23-1385(C) [access by union to workers on employer property]; (6) A.R.S. § 23-1382(1) [exclusion of stitchers and haulers from AERA]; (7) A.R.S. §§ 23-1384, 23-1385(B)(11), 23-1385(D) [elimination of "management rights" from bargaining process]; (8) A.R.S. §§ 23-1385(B)(13), 23-1393(B) [restriction and prohibition against striking and picketing]; and finally, (9) A.R.S. § 23-1392 [criminal penalties for violation of the Act].

The defendants have disputed the unconstitutional effects of the AERA as claimed by plaintiffs, and have consistently argued that this challenge fails to present a justifiable claim, both as to the substantiality of the federal questions presented by plaintiffs, and because

they argue no case or controversy is presented to the Court. They also ask that this Court abstain from deciding this case. As will become clear in this decision, the doctrine of abstention is not applicable to this case.

Defendants further claim that all testimony and other evidence received by this Court during the course of a four day nonjury trial on January 18, 19, 20, and 21, 1977, should be rejected by this Court as immaterial and completely conjectural and consisting of legal conclusions rather than factual evidence — even opinions and testimony given by the defendants' own experts.

As to this last point, defendants impose too restrictive a view on the admissibility and character of the evidence submitted in this case. Under Rules 701, 702, 703, and 704 of the Federal Rules of Evidence, much of the testimony of the experts relied upon by both parties is admissible either as of the type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject, or of the kind of specialized knowledge that assists the trier of fact in determining facts in issue, ultimate or otherwise.

A pertinent example would be the opinions expressed by the experts of both sides as to time periods to be expected in the operation of various provisions of the Act, the length of growing seasons, facts growing out of their personal experiences with organizing

unions, or in the operation of analagous statutes, i.e., the National Labor Relations Act or the California Agricultural Labor Relations Act.

Again as to this last point, i.e., testimony concerning operation of the analagous statutes, what is admissible as to this line of testimony is not an opinion of the expert as to the legal effect of the particular provision of the AERA, but rather, given a particular interpretation of a provision, a hypothetical if you will as to the legal effect of a provision, the opinion of the expert as to the practical effect of such an interpretation based on his previous experience and expertise *is* admissible *if* the legal premise on which the question is based is accepted by the court. Even if a hypothetical question as such is not asked, but it is obvious that the opinion of the expert is based on a certain interpretation of a statutory provision, which the court accepts as the appropriate interpretation, then the interpretation and resultant opinion testimony based on this interpretation is admissible. *Burlington Northern, Inc. v. Boxberger,* 529 F.2d 284, 286-87 (9th Cir., 1975); *United States v. School District 151, etc.,* 404 F.2d 1125, 1134-35 (7th Cir., 1968); *Confederated Tribes of Warm Springs Reservation v. United States,* 177 Ct.Cl. 184 (1966).

Evidence presented during the four day trial was introduced relative to A.R.S. §§ 1384, 1385(A)(5), 1385(B)(11), 1385(D), 1389, and on the plaintiffs' claim that the exclusion of stitchers and haulers and sixteen-year olds from the AERA, § 1382(1) and 1382(1)(g), was a violation of the Equal Protection Clause as well as a similar claim that exclusion of those farm workers who did not work for the same

employer the previous calendar year from representation elections was likewise a violation of the Equal Protection Clause.

JURISDICTION

As a result of foundation questions asked of the witnesses, Caesar Chavez, Stanley Lubin, George W. Campbell, and James W. Cherry, this Court accepts all four as experts competent to give the opinions to which they testified.

It is the opinion of the Court that evidence need only be considered with respect to A.R.S. § 23-1389, the provision of AERA dealing with "Representations and elections," and with respect to A.R.S. § 23-1385(C). However, before setting forth the Court's findings as to these facts, the initial issue raised by defendants, namely, their allegation that this Court does not have jurisdiction because there is not a substantial federal question or a case or controversy presented to this Court by plaintiff's challenge to the AERA, will be settled.

Defendants in consistently espousing this view, that this Court does not have jurisdiction, have again emphasized in their argument that a single judge would have had jurisdiction to dismiss this case upon the Article III grounds and that this holds true even more so with the three-judge court.

The lack of jurisdiction motion was initially denied by the district judge prior to the empanelling of a three-judge court. Then the matter remained unresolved by this panel because of plaintiffs' contentions that the AERA was invalid on its face as overbroad and vague with respect to alleged infringement of con-

stitutional rights. This, coupled with the criminal penalty provisions and the complexity of the case, made postponement of the jurisdiction question until after the trial a reasonable course of action. In so ruling we left Article III open as a threshold question and could proceed to a decision on the merits once jurisdiction was settled.

Plaintiffs' response to defendants' Article III attack is that such attack is not valid because of the "Stipulation Regarding Enforcement of the Act," filed by the parties, which reflects some seven suits have been filed against the plaintiff (U.F.W.) and its members and supporters based on sections of the AERA, and that as a result speech activities have been enjoined including handbilling and oral conversations — on three occasions by an *ex parte* temporary restraining order without notice or hearing.

In addition, plaintiffs argue that the Board itself has initiated charges against the U.F.W. which resulted in limitations on plaintiffs' rights. Finally, plaintiffs note that in *Roy's Liquor, et al., v. United Farm Workers* (set forth in the said stipulation), the Board apparently held they had no jurisdiction to consider challenges to the constitutionality of the Act.

From these examples cited by plaintiffs, and not controverted precisely by defendants, it must be concluded that this case is not hypothetical, abstract, or generalized.

As the court said in *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947), a case or controversy is created by a showing that one is injured by the statute's operation or that a

construction of the statute to avoid the constitutional questions is impossible. Certainly a challenge for facial invalidity meets the *Rescue Army* test.

In addition to those matters contained in the stipulation, there is the matter of the criminal penalty provision of the statute, which reads as follows:

> § 23-1392. *Penalties.*
>
> Any person who willfully resists, prevents, impedes or interferes with any members of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who violates any provision of this article is guilty of a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than one year, or both. Provided, however, that none of the provisions of this section shall apply to any activities carried on outside the state of Arizona.

It would appear on the face of this provision of the AERA that it cuts across and covers the entire Act, not just a limited area where a criminal penalty might be acceptable. It says in plain English that it applies to "any person" and further to any person "who violates any provision of this article is guilty of a misdemeanor. . . ."

Considering the enormous variety of activities covered by the Act, and the fact that (as will be more fully discussed later) many of these involve First and Fourteenth Amendment constitutional rights, it is clearly a statutory provision so vague that men of common intelligence can only guess at its meaning. Conduct can only be prohibited and punished by certain, clear statutes, and such precision is necessary so

that "the ordinary person can know how to avoid unlawful conduct." *U.S. v. Sullivan,* 332 U.S. 689, 68 S.Ct. 331, 92 L.Ed. 297 (1948). Even closer scrutiny is warranted where the regulation covers freedom of speech. *Ashton v. Kentucky,* 384 U.S. 195, 86 S.Ct. 1407, 16 L.Ed. 2d 469 (1966).

In an area where application of a penal statute may restrict freedoms protected against state invasion by the Fourteenth Amendment's incorporation of the Bill of Rights, the U. S. Supreme Court has been constantly vigilant and protective of these rights.

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute, susceptible of sweeping and improper application. *NAACP v. Button,* 371 U.S. 415, 432-3, 83 S.Ct. 328, 9 L.Ed. 405 (1963).

The overbroadness and vagueness already discussed are compounded by the provision that the U.F.W. is bound by the acts of its agents and whether or not the acts so performed "were actually authorized or subsequently ratified shall not be controlling." A.R.S. § 23-1393(F). Since the Act restricts the U.F.W. and its agents, and provides criminal penalties for violation by any person, the U.F.W. could be subject to sanctions regardless of its relationship to the agent.

There is no way for anyone to guess whether criminal provisions will apply to any particular conduct, in advance, and it is clear that the statute is unconstitutionally vague and does not adequately define

prohibited conduct and is, therefore, in violation of the due process clause of the Fourteenth Amendment. *Whitehall v. Elkins,* 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed. 2d 228 (1967); *Keyesbian v. Board of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Elfbrandt v. Russell,* 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed. 2d 321 (1966); *NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958); *Conally v. General Construction Co.,* 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

Recently the U. S. Supreme Court considered the case or controversy issue in the context of a challenge to a criminal statute. In *Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed. 2d 201 (1973), the Supreme Court addressed the question whether a licensed physician's challenge to a Georgia anti-abortion statute presented a justiciable controversy. In that case, there was no record of a pending or threatened criminal prosecution and the Act had not been enforced against the plaintiffs. Still the court found a controversy did exist and reversed the lower court's dismissal saying:

> The physician is one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory options and conditions. The physicians-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo criminal prosecution as the sole means of seeking relief. *Crossen v. Breckenbridge,* 446 F.2d 833, 839, 839-840 (6th Cir. 1971); *Poe v. Menghini,* 339 F.Supp. 986, 990-991 (Kan. 1972).

Throughout their arguments the intervenors and defendants have argued that there is no case or controversy here since no criminal prosecution has been commenced against the plaintiffs.

At the same time, as their memorandum reveals, they are also aware that were there pending criminal cases against the plaintiffs under AERA, this Court would hesitate to take jurisdiction for reasons of equity, comity, and federalism.

Yet courts have found case or controversies when criminal statutes were challenged as overbroad even before the acts went into effect or there had been any enforcement. *Wounded Knee Legal Defense/Offense Committee v. F.B.I.,* 507 F.2d 1281 (8th Cir. 1974); *Brown v. Brannon,* 399 F.Supp. 133, aff'd 535 F.2d 7249 (4th Cir. 1975); *Hjelle v. Brooks,* 377 F.Supp. 430 (D.Alas. 1974); *Stoner v. Miller,* 377 F.Supp. 177 (E.D.N.Y. 1974); *Associated Students, University of California at Riverside v. Attorney General of the United States,* 368 F.Supp. 11 (C.D. Cal. 1973); *Valley Health Systems v. City of Racine,* 369 F.Supp. 97 (E.D. Wisc. 1973); *Mortillaro v. State of Louisiana,* 356 F.Supp. 521 (E.D. La. 1972).

The significance of these cases is clear; that is, if plaintiffs are persons against whom the particular criminal statute directly operates, and whether they assert a sufficiently direct threat of personal detriment.

There can be no question that the plaintiffs in the present lawsuit are precisely those persons and organizations whose activity the penal statute was designed to regulate, and they have asserted a direct threat of

personal detriment both through its past enforcement as well as the threat of its continued enforcement.

It is true that A.R.S. § 23-1392 of the AERA relating to penalties is severable, and that if so severed and declared invalid, the rest of the Act could stand as it is not dependant for its operation upon this section. However, it is sufficient in and of itself as being unconstitutionally invalid and void on its face to give this Court jurisdiction and create a case or controversy.

If the plaintiffs are correct in their contentions that many provisions of the AERA are unconstitutional and void on their face, then a substantial federal question exists as to the constitutional rights that are infringed upon by the AERA and this Court would have jurisdiction. However, if defendants maintain that any sections of the Act found to be unconstitutional are severable, then the remainder of the Act could stand as operable law.

Where it is not possible to separate that part of a law which is unconstitutional from the rest of the law, the whole law fails. *Lynch v. U.S.*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922); *Harrison v. St. Louis & S.F.R. Co.*, 232 U.S. 318, 34 S.Ct. 333, 58 L.Ed. 621 (1914); *Gherma v. State*, 16 Ariz. 344, 146 P. 494 (1915).

A law is void on its face if it does not aim specifically at evils within the allowable area of governmental control, but sweeps within its ambit other activities that constitute an exercise of protected expressive or associated rights. (see: "The First Amendment Overbreadth Doctrine" 83 Harv. L. Rev. 844 (1970).)

A plausible challenge to a law as void for overbreadth can thus be made when (1) the protective activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a simple step from the law's reach.

In laws having these two characteristics, the usual approach of constitutional adjudication — gradually cutting away the unconstitutional aspects of a statute by invalidating its improper applications case by case — does not respond sufficiently to the peculiar vulnerable character of activities protected by the first amendment. For an "overbroad" law of the sort described here "hangs over [people's] heads like a Sword of Damocles." *Arnett v. Kennedy*, 416 U.S. 134, 231, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974). That judges will ultimately rescue those whose conduct in retrospect is held protected is not enough, "for the value of a Sword of Damocles is that it hangs — not that it drops." The resulting deterrent to protected speech is not effectively removed if "the contours of regulation would have to be hammered out case-by-case and tested only by those hardy enough to risk criminal prosecution [or other sanctions] to determine the proper scope of regulation. *Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965). The only solution, then, is to strike down such an overbroad law altogether. . . . This result may be understood as an exception to the rule that individuals are not ordinarily permitted to litigate the rights of third parties, since an individual whose conduct may not itself be protected by the first

amendment is awarded a judicial victory on the claim of a law's potential unconstitutional applications to the conduct of persons not before the court. *American Constitutional Law,* Laurence H. Tribe, The Foundation Press, 1978.

CONCLUSIONS OF LAW

After consideration of the many-pronged attack made by plaintiffs on the constitutionality of the various provisions of the AERA, and the defendants' response thereto, this Court finds and concludes that the Agricultural Employment Relations Act, A.R.S. §§ 23-1381, et sequence, is unconstitutional in its entirety for the reason that A.R.S. §§ 23-*1385(B)(8)*, 23-*1392*, 23-*1393(B)(1)* are unconstitutional and void on their face, and A.R.S. §§ 23-*1385(C)* and 23-*1389* are likewise unconstitutional when considered in context with the testimony and other evidence presented, and these sections are found to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and in violation of the freedom of speech and assembly provisions and of the due process and equal protection clauses with A.R.S. § 23-1393(B) also found to be in violation of the Seventh Amendment providing for right to trial by jury and with the rest of the Act falling by reason of its inseparability and inoperability apart from the provisions found to be invalid.

FINDINGS OF FACT

Turning now to the facts found by this Court to be pertinent to a consideration of the constitutionality of A.R.S. §§ 23-1385(C) and 23-1389.

The majority of agricultural employees as defined by the AERA are directly engaged in the planting, preparation and/or harvesting of row crops, field crops, tree fruits, and grapes. The greatest number of field workers employed by an agricultural employer are employed during the peak of the harvest season. This peak period is that time when fifty percent or more of the highest number of agricultural employees employed at any time during the harvest season are employed.

Most of the agricultural employees in Arizona, about seventy-five to eighty percent of the total man-days worked each year, are employed in the growing and harvesting seasonal fruits and vegetables. Major crops in this category include lettuce (approximately twenty percent), citrus (approximately twenty-two percent), grapes and deciduous trees (approximately five to ten percent), vegetables, other than lettuce, including green onions, dry onions, carrots, cauliflower, broccoli, cabbage, etc. (approximately twenty percent), and cantaloupes (approximately five to ten percent).

The length of the harvest season and times of peak employment are for the most part very short. The great majority of the lettuce crop in Arizona is harvested in separate spring and fall harvests. The length of these harvest seasons for any particular employer ranges from four to six weeks within which there is a period of peak employment of only three to four weeks.

The grape harvest occurs once annually and lasts from four to six weeks with a period of peak employment of three to four weeks.

Cantaloupes are harvested in from three to seven weeks with a peak of only two to three weeks while the dry onion harvest for any single agricultural employer usually takes about two to four weeks.

The citrus harvest in Arizona lasts for ten to eleven months, approximately from September to mid-July. Green onions may be harvested for as long as ten months of the year. Even in these latter crops, citrus and green onions, there are factors which make the period of employment of particular workers for a specific employer considerably shorter than the length of the total harvest. Employers do not always have each successive crop ready for harvest at the end of the harvesting of the preceding crops. Therefore, the work is intermittent and employees often must switch employers. Many of the workers are migratory who must leave an area immediately after a harvest to find other employment. Many employees do not return to the same employer in a following year so that each year there is a substantial change in the work force.

Green onions also involve an industry where there is tremendous turnover because workers are paid on a daily cash basis and because many minors are employed.

In citrus, crews are constantly moved from employer to employer throughout the harvest season picking only intermittently for any particular employer for from a few days to a few weeks.

If an election is to be held so that a majority of employees of a particular grower can participate, such an election must be held during the period of peak employment. To accomplish this, the law should assure that an election can be petitioned for during such peak periods, and that the procedures for holding elections does [sic] not extend in time beyond the period of peak employment.

Any labor organization seeking to organize Arizona agricultural workers employed in these industries must by reason of provisions of the AERA relating to the representation and election provisions of the AERA, and because of the very nature of the organizational process based on previous experience with analogous statutes, e.g., National Labor Relations Act and the California Agricultural Labor Relations Act, take certain periods of time to accomplish certain organizational goals.

For example, it takes approximately three to six weeks for a union to gather authorization cards to be submitted with a petition for a representation election. Activities which must be carried out by the union during this time include locating all the various fields of an employer, identifying his employees, contacting those employees, and informing and persuading them to sign authorization cards. This cannot be done until the harvest season has begun since there is a substantial turnover in employees from year to year and it is impossible to determine who will work for an employer until that person is actually found in the field. Also to

protect employees from possible employer retaliations, organizing must be done at a time relatively near the election.

It is usually within an employer's power to delay the process of obtaining sufficient authorizations by employing coercive tactics to discourage union activities among his employees.

Much of the work of reaching agricultural employees must be done on the employer's property, since most agricultural employees are migrants with no permanent residence in the area and live in labor camps on the employer's premises.

The election procedures of the AERA are virtually identical to those of the National Labor Relations Act which, in a contested election, requires from six to seven weeks for completion.

The election provisions of the AERA call for a Board investigation of the petition, the setting and holding of a pre-election hearing upon the demand of the employer, decision of issues raised at the hearing, and granting the employer ten days to provide a list of employees to the Board and the union.

The experience of the plaintiff U.F.W. in participating in over 400 elections in California in the agricultural industry was that it took from three to six weeks before petitions could be filed. Under NLRB experience the hearing is not held until from fourteen to twenty-one days after the petition is filed.

The six to seven week period between the filing of a petition and the holding of an election will be longer than many of the seasons of peak employment. When this period is added to the three to six weeks of work

which must be done before a petition can be filed, the entire process cannot take place before the majority of the employees finish their work and leave their place of employment.

Experience under both the N.L.R.A. and in California employer-employee situations in the agricultural industry, has shown that some employers do utilize such coercive and intimidating tactics during elections that both the NLRB and the California Board have found that even after remedial action for unfair labor practices, it was impossible to hold a fair, uncoerced election.

In such situations it has been determined that the only way to preserve the employees' right to collective bargaining was to issue orders to bargain to the employer, absent an actual certification through a secret ballot election.

Absent such power to issue such bargaining orders, the Board, acting pursuant to the AERA, would be without adequate remedy to protect employee rights to collective bargaining. Since the AERA prohibits the Arizona Board from issuing such an order requiring an employer to bargain with a union, unless that union is certified through an election, the AERA encourages employers to commit those types of unfair labor practices which result in election coercion and in turn to a "no-union" vote. Such a practice could be engaged in year after year, effectively delaying any bargaining.

REPRESENTATION AND ELECTION PROCEDURES

Having stated these facts, our consideration turns naturally to that provision of the Act most important to a consideration of its constitutionality. This is A.R.S. § 23-1389 (employee representation, recognition, and election procedures). For a full analysis of this point as well as an exhaustive analysis of the AERA, see: "State Regulation of Agricultural Labor Relations — The Arizona Farm Labor Law — an Interpretive and Comparative Analysis." Warren H. Cohen, Jonathan Rose. Law and the Social Order, 1973, p. 313 through 431, at 322.

The stated legislative purpose of the Act as enunciated in its "Declaration of Policy," A.R.S. § 23-1381, is said to be:

> . . . the policy of this state that agricultural employees shall be free to organize, to take concerted action, and through representatives of their own choosing enter into collective bargaining contracts establishing their wages and terms and conditions of employment; . . ."

Such a stated policy is but a recognition of the First Amendment right to free speech, to assemble peaceably, and the due process right of all in America who desire to do so to participate and retain membership in a union. *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *N.A.A.C.P. v. Alabama, ex rel. Paterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958); *Hagne v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1414 (1939); *NLRB v. Jones and McLaughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed 893 (1937); *Lontine, et al., v. Van Cleave*, 483

F.2d 966 (10th Cir. 1973); *American Federation of State, County & Municipal Employees v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 2d 430 (1945). See also "A Preliminary Survey of the Arizona Farm Labor Act," Robert A. Kerry, *Arizona Law Review*, Vol. 14, No. 4, p. 766 at 801.

The section in question reads as follows:

§ 23-1389. *Representatives and elections*

A. Representatives selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in a unit appropriate for such purposes shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. If ratification of any such contract is required, the right to vote in such ratification shall be limited to the employees in the bargaining unit. Any individual agricultural employee or a group of agricultural employees may at any time present grievances to their agricultural employer and have such grievances adjusted, without the intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect. The bargaining representative shall be given opportunity to be present at such adjustment.

B. The board shall decide in each case whether in order to ensure to employees the fullest freedom in exercising their rights the unit appropriate for the purposes of collective bargaining shall consist of either all temporary agricultural employees or all permanent agricultural employees of an agricultural employer working at the farm where such employer grows or produces agricultural products or both. In making unit determinations the extent of a union's extent of organization shall not be controlling. Principal factors should be the community of interest between employees, same hours, duties and compensation, the administrative structure of the employer and control of labor relations policies.

C. The board shall investigate any petition, and if it has reasonable cause to believe that a question of representation exists shall provide for an appropriate hearing upon due notice, when such petition has been filed in good faith in accordance with such regulations as may be prescribed by the board:

1. By an agricultural employee or group of agricultural employees or any individual or labor organization acting in their behalf alleging that thirty per cent or more of the number of agricultural employees in the unit in question either wish to be represented for collective bargaining and that their employer declines to recognize their representative or assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative is no longer a representative.

2. By an agricultural employer alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative or that an individual or labor organization which has previously been certified as the bargaining representative is no longer a representative.

D. If the board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. If a second labor organization files a petition for an election alleging that thirty per cent or more of the employees in the unit in question desire to be represented by that labor organization, then the board shall require that the names of both labor organizations shall appear on the ballot. In any election the voters shall be afforded the choice of "no union". If in a representational election where more than one union is on the ballot, and none of the choices receives a majority vote, a second election shall be held. The second election shall be between the union receiving the highest number of votes and "no union". In any election a labor organization shall obtain a majority of all votes cast in that election in order to be certified as the bargaining representative of all the employees in that unit.

E. In determining whether or not a question of representation exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought. In no case shall the board deny a labor organization a place on the ballot by reason of an

order with respect to such labor organization or its predecessor not issued in conformity with § 23-1390.

F. Within five days of receipt of such a petition, the agricultural employer may file a challenge to such petition on the ground that the authorization for the filing of such petition is not current or that such authorization has been obtained by fraud, misrepresentation or coercion. Such petition shall not act to stay the election proceeding but if it is thereafter determined that the authorizations are not current or obtained by fraud, misrepresentation or coercion the petition will be dismissed.

G. No election shall be directed or conducted in any bargaining unit or any subdivision thereof within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the board shall find are consistent with the purposes and provisions of this article in any election conducted within three months after the commencement of the strike. Any agricultural employee who is found to have sought or accepted employment only for the purpose of affecting the outcome of an election shall not be eligible to vote in an election conducted pursuant to the provisions of this article for a period of twelve months from the date of that election.

H. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the board.

I. The agricultural employer, within ten days after an election is directed by the board or a consent election agreement is approved by the board and on request of the board, shall furnish to the board a list of agricultural employees in the bargaining unit who are qualified to vote, and such a list shall be made available to the organizations or other interested employees involved in the election.

J. Upon the filing with the board, by thirty per cent or more of the agricultural employees in a bargaining unit covered by a certification or by an agreement between their employer and a labor organization made pursuant to § 23-1385, of a petition alleging the desire that such representation authority be rescinded, the board shall conduct an election by secret ballot of the employees in such unit and certify the results thereof to the labor organization and to the employer.

This section of the AERA is the threshold over which employees must pass if they desire to exercise their constitutional right to " . . . organize . . . take concerted action . . . through representatives of their own choosing. . . ."

If this section fails, the rest of the Act must fail, since most of the use of the Act would apply only if farm workers were initially free to organize and not if the exercise of such a constitutional freedom of assembly were made impossible.

Essentially, this provision of the Act must be found constitutionally invalid as being in violation of the First and Fourteenth Amendments to the Constitution, because of the excessive length of the procedures permitting delays of unit representation elections coupled with the seasonal nature of agricultural labor.

The constant flux of workers to job sites, the broken routines, the mobility and interchange with different employers, and the short span of working periods during peak employment periods when the majority of workers in a proposed unit are employed by a grower, make it impossible for the Agricultural Employment Relations Board to conduct a timely election to effect the purpsoes of the Act.

Representation and recognition by the union, and the requirement that an employer bargain with the union, can only be achieved if the union is chosen to represent the employees through the election procedures set out in the A.R.S. § 23-1385(A)(5). Before an election can be held, the union must first demand and be denied recognition by the employer. A.R.S. § 23-1389(C)(1). There is no time set out in the law within which the employer must answer this request.

If the employer does not petition for an election, and denies a request for recognition, then the union must petition for an election showing that at least thirty percent of the employees in the unit wish to be

represented by the union. A.R.S. § 23-1389(C)(1). If the AERA Board has reasonable cause to believe that a sufficient number of workers desire to have a union to represent them to justify an election, it will set a pre-election hearing. Again no time period is provided in the Act for how soon the Board must act. Since time for such notice is not provided, the general application of the Arizona Administrative Procedure Act stamps a twenty day period (A.R.S. § 41-1009) on how soon the hearing will be held.

If at the hearing, the Board determines there is a question of representation, it will direct an election by secret ballot. Again there is no provision setting the time within which the election must be held.

Once the Board has fixed the time for a union election, the employer has ten days to submit to the Board a list of his employees eligible to vote. A.R.S. § 23-1389(I). Then the election must be by secret ballot. If the union wins a majority of the votes cast, it will be certified by the Board as the representative for that unit and the employer will be required to bargain collectively with the union. § 23-1385(A)(5); see also § 23-1385(D).

The Board is directed by the AERA to form the unit from either all "permanent" employees, all "temporary" employees or both. A.R.S. § 23-1389(B). Permanent employees are defined as those "over sixteen years of age who . . . [have] . . . been employed by a particular agricultural employer for at least six months during the preceding calendar year." A.R.S. § 23-1382(1).

The Board is also directed to form the bargaining unit from employees "working at the farm." A worker could thus be a "permanent" employee but still be excluded from voting because while having worked for the employer for at "least six months during the preceding calendar year," he was not employed at the time of the election (and we take calendar year to have it plain meaning of being a year extending from January through December so that this provision clearly means that a worker must have been employed during the twelve months preceding January 1 of the year in which the election is held).

A temporary employee is defined as "over sixteen years of age . . . employed by a particular agricultural employer and who has been so employed during the preceding calendar year." A.R.S. § 23-1382(1).

Again, a worker not currently employed even though he worked the previous calendar year for the employer could not vote.

In any event, it is also clear from these provisions that many other migratory workers could not vote, even though presently employed, simply because they had not worked for the employer in a particular unit, either for six months or at any time during the preceding calendar year — the practical effect being that a particular worker must be employed during two successsive harvests before being entitled to vote.

These categories of employees eligible to vote set forth in the Act, would appear to be so defined as to preclude a significant and substantial number from participating in the collective bargaining process, from selecting representatives of their own choosing, given

the migratory and transitory nature of agricultural employment.

A second and most significant consequence of determing the unit solely on the basis of the eligible employees as defined by the Act, is that an election in any unit will be a bar to another election for twelve months. A.R.S. § 23-1389(G).

Groups of workers may thus be hired for the same unit at different times of the year, and yet an election among one group will bar an election by a group hired later in the year. An employer could, for example, respond to a petiton for an election filed by a small minority of his permanent, year-round employees, and if they should vote for no-union, then no matter how many hundreds of thousands of employees that employer hires for that unit, thereafter they are barred from holding another election for twelve months — clearly an absolute frustration of their right of free association.

Defendants have argued that even if an election were held before or after the peak period, the plaintiff union could object on the grounds that a non-representative electorate selected the collective bargaining representative. But here again, as if in anticipation of this kind of reaction, A.R.S. § 23-1385(B)(12) prohibits picketing or boycotting "(b) Where within the preceding twelve months a valid election under § 23-1389 has been conducted." or "(c) Where a petition has been filed under § 23-1389."

As noted in the earlier findings, another difficulty arising out of a procedure which makes an election (aside from dubious consent by an employer) the sole procedure for establishing union recognition and representation is that the ballot procedure is subject to disruption by the employer and thus could effectively frustrate any such recognition or representation ever being achieved.

This problem has been well recognized by the courts, and where an election is not a feasible alternative, the NLRA and the courts have recognized the validity of informal methods of designating a union for ordering collective bargaining and an essential method of preserving the rights of employees. *Linden Lumber Division v. UNLRB,* 419 U.S. 301, 95 S.Ct. 429, 42 L.Ed. 2d 465 (1974); *N.L.R.B. v. Gessel* [*sic*] *Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed. 2d 547 (1969); *Bishop v. NLRB,* 502 F.2d 1024 (5th Cir. 1974); *NLRB v. Big Three Industires,* 497 F.2d 43 (5th Cir. 1974); *NLRB v. Kaiser Agr. Chem. Div. of Kaiser A & C Corp.,* 473 F.2d 374 (5th Cir. 1973); *J. P. Stevens & Co., Inc., Gubistan Division v. NLRB,* 441 F.2d 514 (5th Cir. 1971); *NLRB v. Drives Inc.,* 440 F.2d 354 (7th Cir. 1971).

The Ninth Circuit, in following *NLRB v. Gessel* [*sic*] *Packing Co., supra,* noted that without ultimate authority to order collective bargaining regardless of election results, the statutory procedures themselves become an aid to an employer's attempt to prevent unionization. *NLRB v. L.B. Forster Co.,* 418 F.2d 1 (9th Cir. 1969).

Thus the absence in the AERA of any feasible alternative to a secret ballot election is in effect a condonation and an encouragement to intentional interference by the employer in the election process which could effectively prevent any meaningful election from ever being held, again frustrating the right to free assembly and association.

We next consider additional bases for conferring jurisdiction upon this Court, namely, whether there is any other section or sections of the AERA that are constitutionally invalid on their face so that there is a further substantial federal question presented.

We find this to be true of three sections: A.R.S. § 23-1385(B)(8), A.R.S. § 23-1385(C), and A.R.S. § 23-1393(B).

CONSUMER PUBLICITY

The first deals with consumer publicity and reads in pertinent part:

§ 23-1385. *Unfair labor practices.*

B. It shall be an unfair labor practice for a labor organization or its agents:

8. To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and non-deceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does

> not include publicity directed against any trademark trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name.

This provision of the AERA deals specifically with "truthful, honest and undeceptive publicity" and says if publicity is not of this character, it is an unfair labor practice. This section is no doubt intended to prohibit what is commonly referred to as consumer boycotts to be achieved by handbilling, picketing, orally, and other mediums of communication customarily employed by labor organizations.

First, it specifically prohibits inducing or encouraging an ultimate consumer to refrain from purchasing particular agricultural products "by the use of dishonest, untruthful and deceptive publicity." This section goes on to define permissible inducement "as truthful, honest, and nondeceptive publicity which indentifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute."

Plaintiff argues (1) that the section unconstitutionally restricts speech activity because it makes all but truthful, honest, and nondeceptive publicity an unfair labor practice, and subjects a person or organization guilty of such practice to criminal penalties for violation where determination of "truth" is left to be decided by a tribunal after the utterance and thus creates a drill [sic] on the exercise of First Amendment rights, and that (2) the section's limitation on inducement by a union to products produced by the agricultural employer with whom the union has a primary dispute restricts unconstitutionally the right of nonemployees to communicate.

As to the first requisite, the U.S. Supreme Court has held on many occasions that truthfulness is not a prerequisite to First Amendment protection.

In *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed. 2d 1 (1971), the court said:

> It is elementary of course that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. *Under Near v. Minnesota,* 283 U.S. 697, the injunction, so far as it poses a prior restraint on speech and publication constitutes an impermissible restraint on first amendment rights.

Again in *N. Y. Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964), the court also indicated that First Amendment protections apply to other than just truthful statements.

> Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth — whether administered by judges, juries or administrative officials — and especially one that puts the burden on proving the truth to the speaker. *Cf. Speiser v. Randall,* 357 U.S. 513, 78 S.Ct. 1332, 525-26, 2 L.Ed. 2d 1460, 1472 (1958). The constitutional protection does not turn upon the "truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button,* 371 U.S. 415, 445, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963).

That erroneous statement is inevitable in free debate and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need to survive" (citing case) was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney v. Paterson,* 76 U.S. App. D.C. 23, 24, 128 F.2d 457, 458, cert. denied 317 U.S. 678, 63 S.Ct. 160, 87 L.Ed. 544 (1942).

See also *Vanesco v. Schwartz,* 401 F.Supp. 87 (D.C.N.Y. 1975), aff'd without opinion 423 U.S 1041, 96 S.Ct. 763 (1976). The court in *Vanesco* held that a statute prohibiting "deliberate misrepresentations" and regulations prohibiting "misrepresentations" in political campaigns, which on the face of the statute were not based on a finding of actual malice, was an overbroad infringement upon First Amendment rights and was unconstitutional on its face.

The statute here involved likewise contains no intent requirement, and in fact is even broader since it is not limited to "deliberate" misrepresentation.

Although defendants, as to this particular provision and with so many others, are always proposing the narrowest interpretation possible, and suggesting that this is the way that this, and many other provisions, should be interpreted to save constitutionality of a statute, yet, as has been said, where First Amendment rights are involved, this prohibition in this section of the statute involving as it does a prior restraint on free speech, must be narrowly drawn, and the speaker should not be "chilled" by the potential that some interpretation of his expression concerning which he has no knowledge may make his statement "untruthful." *Gooding v. Wilson,* 405 U.S. 518, 92 S.Ct. 1003, 31

L.Ed. 408 (1972); *Pickering v. Board of Education,* 391 U.S. 563, 573-74, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968); *Garrison v. Louisiana,* 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed. 2d 125 (1964); *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963) *Cafeteria Workers Local 302 v. Angelos,* 320 U.S. 293, 295, 64 S.Ct. 126, 88 L.Ed. 58 (1943); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); *Cantwell v. Connecticut,* 310 U.S. 296, 310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

The next questionable part of this section, namely, A.R.S. § 23-1385(B)(8), is that which limits consumer picketing by the union solely to situtations in which the union has a primary dispute with a particular grower and the picket signs must identify that grower. However, if that particular grower with whom the union has a primary dispute sells to a trade association which utilizes a trade name on the products sold which include the particular grower's product, the union is forbidden in its consumer picketing from referring to that trade name.

Defendants argue that this language is necessary to protect a grower not involved in a dispute with the union who happens to deal in the same product bearing the same trade name, as the grower with whom the union does have a dispute.

However, it must be noted that A.R.S. § 23-1382.6 is the only definition of "dispute," and it is there defined as " . . . any controversy between an agricultural employer and his agricultural employees . . . ." Construing A.R.S. § 1385(B)(8) in light of A.R.S. § 23-1382.6 means that a labor organization is permitted to conduct picketing against a particular employer only if

that employer's employees have a controversy over terms and conditions of employment.

In *AFL v. Swing*, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1941), the Illinois Supreme Court had enjoined picketing by a labor union on the ground that there was no dispute between the employer and his immediate employees. The United States Supreme Court reversed, however, holding that an injunction was inconsistent with "the right to free discussion" and therefore unconstitutional. It follows that if a primary dispute is not required for primary picketing, it cannot be made a requirement for secondary picketing. The same "right to free discussion" is abridged, and it is not outweighed by the State's interest in protecting the secondary employer since the existence of a primary dispute has no relation to whether the secondary employer is being subjected to economic coercion. See also: *Baldwin v. Arizona Flame Restraurant*, 82 Ariz. 385, 313 P.2d 759 (1957), where the Arizona Supreme Court held unconstitutional A.R.S. § 23-1322 which required a "bona fide dispute regarding wages and working conditions" between an employer and a majority of his employees as a prerequisite to lawful picketing. See also: *NLRB v. Fruit Packers Local 760*, 377 U.S. 58, 84 S.Ct. 1063, 12 L.Ed. 2d 129 (1964).

This section of A.R.S. § 23-1385(B)(8) therefore is invalid on its face as a violation of the free speech provison of the First Amendment to the Constitution.

ACCESS BY UNION REPRESENTATIVES

Turning next to a consideration of § 23-1385(C) which in pertinent part reads as follows:

> C. . . . No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information *time*, or *facilities* (emphasis added) to enable such employer or labor organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters, or adherents.

This provision clearly states that an employer of migrant farm workers does not have to provide a time or place when and where the union can communicate with his workers, and it also means that the employer does not have to allow the union to come upon his property. The provision provides a positive tool for a grower employer to keep any one and everyone away from his property.

Given the fact, as shown by testimony and other evidence and really not disputed by defendants that the vast majority of farm workers are migratory and generally reside in areas or labor camps located on property owned by the employer, this section must fall because it constitutes an unconstitutional restriction on the First Amendment exercise of free speech because of private property interests.

Even defendants agree that there must be an accommodation between organizational rights and property rights by citing *Central Hardware Co. v. NLRB*, 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed. 2d 122 (1972), but no such accommodation is permitted by this section of the statute.

Beginning with *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), which held that ownership of property didn't always mean absolute domain and that private property was *not* per se immune from a constitutional protection of people on or entering upon property, the courts continued to assert this same principle.

In *Peterson v. Talisman Sugar Co.*, 478 F.2d 73 (5th Cir. 1973), the court found that a labor camp was more analagous to the traditional "company town" than shopping centers discussed in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed. 2d 603 (1971); *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed. 2d 196 (1976); and *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed. 2d 131 (1971) relied upon by defendants.

In the latter cases, the Supreme Court upheld restrictions on exercise of First Amendment rights because of private property interests.

In the company town situation, pertinent to the facts of this case, the court in *Marsh v. Alabama, supra*, found that there was nothing in the company town, except for mere title in a corporation, which would justify treating it differently from any other municipal center.

The court in *Peterson v. Talisman Sugar Co., supra*, went on to hold that a labor camp was a functional equivalent of a municipality and the company had to accommodate its property rights to the extent necessary to allow the free flow of ideas and information between the union and the migrant workers. See also:

Illinois Migrant Council v. Campbell Soup Co., 478 F.2d 73, 82-83 (5th Cir. 1973); *United Farm Workers Union, AFL-CIO v. Mel Finerman Co.*, 364 F.Supp. 326 (D.Colo. 1973); *Francheschina v. Morgan*, 346 F.Supp. 833 (S.D. Ind. 1972); *Folgueras v. Hassle*, 331 F.Supp. 615 (W.D. Mich. 1971); "First Amendment and the Problems of Access to Migrant Labor Camps After Lloyd Corporation v. Tanner," 61 Cornell L.Rev. 560 (1976).

Defendants argue that this section makes no reference to and does not restrict the rights of employees to communicate with other employees during non-work time in non-work areas, and that the section restricts only labor organizations. They say this section doesn't deny access, it just says that the employer doesn't have to furnish facilities and the union "is not prohibited, in the exercise of free speech, from going into non-work areas on the property at reasonable times for legitimate, peaceful purposes."

However, as to alternative means of communciation, A.R.S. § 23-1389(I) provides that an employer need only provide a list of names of the people working for him, and this, taken in conjunction with A.R.S. § 23-1385(C)'s provision which states that no employer shall be required to furnish or make available information to enable a union to communicate with employees, effectively deprives the union of any alternative form of communication due to the migrant nature of the workers.

Defendants also attempt to make a distinction between "furnishing" and "denying access." They seem to argue that these are always two separate acts, one an affirmative and the other negative, and that the Act

only applies to one, namely "furnishing." In fact they would appear to be the same activity. If the grower doesn't have to "furnish facilities" that clearly means he doesn't have to provide a time or place when the union can communicate with his workers, and thus also means that he does not have to allow them to come onto his property.

Defendants also seek to distinguish between employee and non-employee union organizers, contending that the former has rights of access while the latter does not. Aside from the dubious value of this distinction in constitutional terms, the words of the statute are not so limited and an employee who is a union organizer is considered under normal agency principles to be an agent of the union, and the employer would not be under any obligation to allow time or facilities for him either.

In brief then, an employer does not have to grant access to facilities which he does not have to furnish.

Given the clearly established rights of communication and organization, this section of A.R.S. § 23-1385(C) is constitutionally defective because it prohibits too broad a scope of activity, both protected and unprotected, involving freedom of association and speech.

COURT JURISDICTION

We turn finally to A.R.S. § 23-1393(B) which in pertinent part reads:

§ 23-1393. *Court jurisdiction*

. . .

B. In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues. Any agricultural employer shall be entitled to injunctive relief accorded by Rule 65 of the Arizona Rules of Civil Procedure upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities. For the purpose of this subsection, an agricultural commodity or commodities for human consumption with a market value of five thousand dollars or more shall constitute commercial quantities.

This section provides a unique remedy to the employer. On his verified petition to the Court, alleging that his employees are unlawfully on strike and alleging a prevention of production or loss or spoilage of his crop, several things happen:

1. As a condition for the order he, the employer, must "agree" to submit the issues to binding arbitration;

2. If the parties within two days after the issuance of the order cannot agree upon an arbitrator to decide the issues, the Court *"shall"* appoint one "to decide the unresolved issues."

The effect of the section is apparent, if the union should insist under the "employees' rights" section (A.R.S. § 23-1383) that they have a right to bargain concerning an issue which is contrary to that of the employer's position under the "management rights" sections (A.R.S. §§ 23-1384, 23-1385(B)(11), 23-1385(D), then any resultant strike by the union in support of their position can be unilaterally deemed "unlawful" by the employer who can, without the consent of the union, submit the dispute to binding arbitration by an outsider. The act then mandates the Court to submit the matter to a stranger and deprives the Court of further jurisdiction to hear the matter on its merits.

Such unilateral compulsory arbitration constitutes a clear denial of due process under the law for when the effect of statutes has been to coerce parties to submit to arbitration, without agreement or assent on their part to do so, the courts have declared them unconstitutional [*Dorchy v. Kansas*, 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686 (1924); *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 (1923); *Graves v. Northern P. R. Co.*, 5 Mont. 556, 6 P. 16 (1885)] as depriving parties of liberty and property without due process of law, 55 A.L.R. 2d 445, 510, or as depriving parties of constitutional right to a trial by jury. *Re Smith*. 381 Pa. 223, 112 A.2d 625, app. dismissed, 350 U.S. 858, 76 S.Ct. 105, 100 L.Ed. 762 (1955).

Furthermore, under Arizona law pertaining to arbitration which contains procedures for arbitration and means of review, § 12-1517 makes such article to have "... no application to arbitration agreements between employers and employees or their respective representatives."

We therefore strike down this section of the statute, A.R.S. § 23-1393(B), as unconstitutional in violation of the due process clause of the Fourteenth Amendment to the Constitution and the Seventh Amendment providing for right to trial by jury.

CONCLUSION

To conclude, we find that the fatal flaw in the Arizona Agricultural Employment Relations Act consists of the inability of agricultural employees to organize in the first instance to exercise their right of freedom of speech and assembly, as we indicated in striking down A.R.S. § 23-1389.

This, coupled with the other sections struck down, results in a complete perversion of the expressed intent of the Legislature to allow agricultural employees to "be free to organize, take concerted action and, through representatives of their own choosing, enter into collective bargaining agreements establishing their wages and terms and conditions of employment ..."

The limitation on this right to organize is frustrated by legislated delay, the inability to communicate with employees at the employer's facilities, the unlawful proscription on free speech, the right to concerted ac-

tion in the form of a lawful strike clearly threatened by the employer's unilateral action in having the issue determined by a stranger through compulsory arbitration which in turn takes away the right to a trial by jury, and finally by the imposition of vauge and ambiguous criminal sanctions. In the light of these rulings there is obviously no need to rule on plaintiffs' other contentions including the claimed equal protection violation.

In light of the findings of this Court,

IT IS ORDERED that a permanent injunction shall issue enjoining defendants from applying or enforcing any of the provisions of A.R.S. § 23-1381, et seq.

DATED this 20th day of March, 1978.

United States Circuit Judge

United States District Judge

United States District Judge

CRAIG, D. J. concurring:

In this case I would have preferred to invoke the doctrine of abstention in order that the Supreme Court of Arizona might first express its opinion with respect to the constitutionality of a law established by the Arizona State Legislature. The majority has elected to consider the case on its merits.

I, therefore, concur in the result, although I would have used fewer words to reach it.

DATED this 19th day of April, 1978.

United States District Judge

FILED APR 20 1978
W. J. Furstenau, Clerk United States District Court For The District Of Arizona
By _____ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

UNITED FARM WORKERS NATIONAL UNION on behalf of itself and its members, et al.,

Plaintiffs,

vs.

BRUCE BABBITT, Governor of the State of Arizona, et al.,

Defendants,

ARIZONA FARM BUREAU FEDERATION, an Arizona corporation, et al.,

Intervenors.

NO. CIV 72-445 PHX CAM

JUDGMENT

This action came on for trial before the court, the Honorable John F. Kilkenny, Circuit Judge; the Honorable Walter E. Craig, District Judge; and the Honorable C. A. Muecke, District Judge, presiding, and the pleadings and memoranda having been considered and the issues having been duly heard and a decision having been duly rendered, and

The Court having found that the Agricultural Employment Relations Act, A.R.S. §22-1381, et sequence, is unconstitutional in its entirety for the reason that A.R.S. §§23-1385(B)(8), 23-1392, 23-1393(B)(1) are unconstitutional and void on their face, and A.R.S. §§23-1385(C) and 23-1389 are likewise unconstitutional when considered in context with the testimony and other evidence presented, and these sections having been found to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and in violation of the freedom of speech and assembly provisions and of the due process and equal protection clauses with A.R.S. §23-1393(B) also found to be in violation of the Seventh Amendment providing for right to trial by jury and with the rest of the Act falling by reason of its inseparability and inoperability apart from the provisions found to be invalid,

IT IS THEREFORE ORDERED that judgment is hereby rendered in favor of plaintiffs herein in accordance with the opinion of the Court and a permanent injunction is hereby entered preventing enforcement by defendants herein of A.R.S. §§23-1381, et seq.

DATED this 19th day of April 1978.

_____
United States Circuit Judge

_____
United States District Judge

_____
United States District Judge

ARTICLE 5. AGRICULTURAL EMPLOYMENT RELATIONS

Article 5, consisting of sections 23-1381 to 23-1395, was added by Laws 1972, Ch. 137, § 1, effective August 13, 1972.

§ 23-1381. *Declaration of policy*

It is hereby declared to be the policy of this state that the uninterrupted production, packing, processing, transporting, and marketing of agricultural products is vital to the public interest. It is also declared to be the policy of this state that agricultural employees shall be free to organize, to take concerted action, and through representatives of their own choosing enter into collective bargaining contracts establishing their wages and terms and conditions of employment; or to refrain from engaging in any or all such activities. It is further declared that there now exists an inequality of bargaining power between agricultural employers and labor unions, arising out of the seasonable character and perishable nature of such agricultural products, the mobility of agricultural labor, and the fundamental differences between agriculture and industry. While the right to strike is a basic right of organized labor, such right must take into account the perishable character and the seasonal nature of agricultural products and must be limited and regulated accordingly. It is the intent of the legislature to provide a means to bargain collectively which is fair and equitable to agricultural employers, labor organizations and employees; to provide orderly election procedures to resolve questions concerning representation of agricultural employees and to declare

that certain acts are unfair labor practices which are prohibited and subject to control by the police power of this state. The overriding special interest of the state of Arizona with respect to certain secondary boycott activities originating in this state, but extending across state lines and directed at employers in other states, must be recognized, and such acts must be made unlawful and subject to control by the police power of this state.

§ 23-1382. *Definitions*

In this article, unless the context otherwise requires:

1. "Agricultural employee, permanent" means any employee over sixteen years of age who has been employed by a particular agricultural employer for at least six months during the preceding calendar year, engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field. "Agricultural employee, temporary" means any employee over sixteen years of age who is employed by a particular agricultural employer and who has been so employed during the preceeding calendar year, engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field. If otherwise qualified, a person shall be considered an agricultural employee if an agricultural employer pays the wages of the employee for work performed for the employer's benefit or on his behalf, even though the supervision of the employee, the bookkeeping, and the issuance of payroll checks is by a person other than the employer. In calculating a work day of an agricultural employee, one hour or more of employment in any one day shall be consid-

ered a work day. "Agricultural employee" also includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. "Agricultural employee" does not include any individual:

(a) Employed by his parent, spouse or by an immediate relative.

(b) Having the status of an independent contractor.

(c) Employed as a supervisor or in a confidential capacity or as a clerical employee or as a guard.

(d) Employed as an executive, professional or technical employee.

(e) Who has quit or has been discharged for cause.

(f) Who is a tenant or a sharecropper and reasonably directs or shares in the management of an enterprise engaged in agriculture.

(g) Engaged in hauling or stitching functions.

2. "Agricultural employer" means any employer engaged in agriculture who employed six or more agricultural employees for a period of thirty days during the preceding six-month period, and includes any person who provides labor and services on one or more farms as an independent contractor if such person, for a period of thirty days during the preceding six-month period, employed six or more employees in such work. In calculating the number of agricultural employees employed by an agricultural employer or provided by an independent contractor, one hour or more of em-

ployment in any one day shall be considered a day of work. "Agricultural employer" also includes any employer, engaged in agriculture with less than six agricultural employees, who voluntarily elects to be subject to this article by filing a request in writing with the board.

3. "Agriculture" means all services performed on a farm as defined and described in § 23-603, including, but not limited to, the recruiting, housing and feeding of persons employed or to be employed as agricultural employees by agricultural employers.

4. "Board" means the agricultural employment relations board.

5. "Farm" means any enterprise engaged in agriculture which is operated from one headquarters where the utilization of labor and equipment is directed and which, if consisting of separate tracts of land, such tracts are located within a fifty mile radius of such headquarters.

6. "Labor dispute" means any controversy between an agricultural employer and his agricultural employees or their representative concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment.

7. "Labor organization" means any organization or any agency defined and described in §§ 23-1301 and 23-1321.

8. "Person" means one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy or receivers.

9. "Professional employee" means:

(a) Any employee engaged in agricultural work that:

(i) Is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work,

(ii) Involves the consistent exercise of discretion and judgment in its performance,

(iii) Is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, or

(iv) Requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning.

(b) Any employee who has completed the course or courses of specialized intellectual instruction and study described in subdivision (a), item (iv), and is performing such work, or is performing such work or related work under the supervision of a professional person while acquiring such specialized instruction.

10. "Representative" means any individual or labor organization.

11. "Supervisor" means any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if such authority requires the use of independent judgment.

12. "Ultimate consumer" means the person who purchases an agricultural product for consumption.

13. "Unfair labor practice" means any unfair labor practice listed in § 23-1385.

23-1383. *Rights of employees*

A. Agricultural employees shall have the right to self-organization, to bargain directly for themselves, and to form and join or assist labor organizations to bargain collectively through representatives of their own free choosing, or to engage in lawful concerted activity for the purpose of collective bargaining or other mutual aid or protection, and each such employee shall have the right, without interference from any source, to refrain from any and all of such activities.

B. Agricultural employees shall also have those rights more particularly defined and described in articles 1 and 3 of this chapter, and shall be protected from the practices described in article 4 of this chapter.

§ 23-1384. *Rights of employer*

A. An agricultural employer shall have the following management rights:

1. To manage, control and conduct his operations, including, but not limited to, the number of farms

and their locations, methods of carrying on any operation or practices thereon, kinds of crops, time of work, size and make-up of crews, assignment of work, and places of work.

2. To hire, suspend, discharge or transfer employees in accordance with his judgment of their ability.

3. To determine the type of equipment or machinery to be used, the standards and quality of work, and the wages, hours and conditions of work. The terms of employment relating to wages, hours, conditions of work, and matters of worker safety, sanitation, health and the establishment of grievance procedures directly relating to a job shall be subject to negotiation.

4. To work on his own farm in any capacity at any time.

5. To join or refuse to join any labor organization or employer organization.

§ 23-1385. *Unfair labor practices*

A. It shall be an unfair labor practice for an agricultural employer:

1. To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 23-1383 and articles 1 and 3 of this chapter,[1] or to violate the protection of employees from the practices described in article 4 of this chapter.[2]

2. To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. An agricultural employer shall not be prohibited from permitting

[1]Sections 23-1381 et seq. and 23-1341 et seq.

[2]Section 23-1361.

employees to confer with him during working hours without loss of time or pay.

3. By discrimination in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

4. To discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this article.

5. To refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 23-1389. Nothing in this article shall be construed as requiring an agricultural employer to bargain collectively until a representative of his agricultural employees has been determined by means of a valid secret ballot election.

6. To discharge or otherwise discriminate against any person because he has filed charges or given testimony before the board or a court.

7. To threaten to have discharged any agricultural employee, or threaten to have reduced wages of any agricultural employees, solely because of any labor activity.

B. It shall be an unfair labor practice for a labor organization or its agents:

1. To impose any economic sanction or to restrain or coerce agricultural employees in the exercise of their rights or to coerce or intimidate any employee in the enjoyment of his legal rights provided by this article, or to intimidate his family, picket his domicile or injure the person or property of any employee or his family. This paragraph shall not impair the

right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.

2. To threaten or impose any economic sanction or reprisal against any person not a member of the labor organization in the exercise of rights under this article, including but not limited to the right to refrain from any or all concerted activity, or against any person, not a member thereof, who refrains from compliance with a union rule, policy, or practice which establishes or affects wages, hours, or working conditions at such person's place of employment.

3. To restrain, coerce, or threaten or impose any fine or other economic sanction against any person who invokes the processes of the board, or the court, or against an agricultural employer or employee in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

4. To refuse to bargain collectively with an agricultural employer, provided it is the majority representative of his agricultural employees as determined pursuant to § 23-1389.

5. To cause or attempt to cause an agricultural employer:

(a) To pay or deliver or agree to pay or deliver any money or other thing of value for services which are not performed or are not to be performed.

(b) To establish or alter the number of employees to be employed or the assignment thereof.

(c) To assign work to the employees of a particular employer.

(d) To discriminate in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Nothing in this paragraph shall prohibit agreements between labor organizations and agricultural employers which regulate hiring and tenure of employment on the basis of seniority; provided further that the labor organization is not given power to determine seniority unilaterally.

6. To engage in a secondary boycott as defined in § 23-1321.

7. To induce or encourage or threaten, restrain or coerce any secondary employer or any executive or management employee of any secondary employer to make a management decision not to handle, transport, process, pack, sell or distribute any agricultural commodity of an agricultural employer with whom a labor dispute exists.

8. To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name

which may include agricultural products of another producer or user of such trademark, trade name or generic name.

9. To restrain, coerce or threaten an ultimate consumer to prevent him from purchasing, consuming or using such agricultural product.

10. To threaten or engage in arson, libel, slander, injury to person or property or other violent conduct when the objective is to prevent the preparing for market, transporting, handling, displaying for sale, or selling of any agricultural product.

11. To intimidate, restrain, or coerce agricultural employers in the exercise of the rights guaranteed by § 23-1384.

12. To picket or cause to be picketed, boycott or cause to be boycotted, or threaten to boycott or picket, or cause to be boycotted or picketed, any agricultural employer when the objective is to induce, encourage, force or require an agricultural employer to recognize or bargain with a labor organization as the representative of his agricultural employees, or the agricultural employees of an agricultural employer to accept or select such labor organization as their collective bargaining representative unless such labor organization is currently certified as the representative of such employees:

(a) Where the agricultural employer has lawfully recognized in accordance with this article any other labor organization and a question concerning representation may not appropriately be raised under § 23-1389.

(b) Where within the preceding twelve months a valid election under § 23-1389 has been conducted.

(c) Where a petition has been filed under § 23-1389.

13. To call a strike unless a majority of the employees within the bargaining unit has first approved the calling of such a strike by secret ballot.

C. The expressing of any views, argument, opinion or the making of any statement, including expressions intended to influence the outcome of an organizing campaign, a bargaining controversy, a strike, lockout or other labor dispute, or the dissemination of such views whether in written, printed, graphic, visual or auditory form, if such expression contains no threat of reprisal or force or promise of benefit, shall not constitute or be evidence of an unfair labor practice or constitute grounds for, or evidence justifying, setting aside the results of any election conducted under any of the provisions of this article. A statement of fact by either a labor organization or an agricultural employer relating to existing or proposed operations of the employer or to existing or proposed terms, tenure, or conditions of employment with the employer shall not be considered to constitute a threat of reprisal or force or promise of benefit. No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time, or facilities to enable such employer or labor

organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters, or adherents.

D. For the purposes of this section, to "bargain collectively" is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment which directly affect the work of employees, or the negotiation of an agreement, or to resolve any question arising thereunder. To "bargain collectively" includes the furnishing of necessary and relevant information in connection with the negotiation of an agreement or any issue arising under such agreement, or requiring as a condition for entering into an agreement the execution of a written contract incorporating any agreement reached if requested by either party. The failure or refusal of either party to agree to a proposal, or to the making, changing or withdrawing of a lawful proposal, or the making of a concession shall not constitute, or be evidence, direct or indirect, of a breach of this obligation. The board in any remedial order shall not direct either party to make any concession or agree to any proposal or to make any payment of money except to employees who are reinstated with back pay as provided in § 23-1390. This section shall not require any agricultural employer to bargain collectively with respect to any management rights. "Management rights", as used in this subsection, include but are not limited to the right to discontinue the entire farming operation or any part thereof, to contract out any part of the work thereof not covered

by a labor contract, to sell or lease any of the real or personal property involved therein, or to determine the methods, equipment and facilities to be used in producing agricultural products or the agricultural products to be produced.

E. Where there is in effect a collective bargaining contract covering agricultural employees, the duty to bargain collectively also means that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification:

1. Serves a written notice upon the other party to the contract of the proposed termination or modification not less than sixty days prior to the expiration date thereof, or if such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification.

2. Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications.

3. Continues the contract in full force and effect without resorting to a strike or lockout for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

F. The duties imposed upon agricultural employers, agricultural employees, and labor organizations shall become inapplicable upon an intervening certification of the board, under which the labor organization or individual which is a party to the contract has been superseded as or ceased to be the representative of the employees subject to the provisions of § 23-1389, and

the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any agricultural employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an agricultural employee of the agricultural employer engaged in the particular labor dispute for the purposes of §§ 23-1385, 23-1389 and 23-1390, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

§ 23-1386. *Agricultural employment relations board; members; terms; appointment*

A. There is established an agricultural employment relations board which consists of seven members.

B. The members of the board shall be appointed by the governor. Two of the members shall be appointed as representatives of agriculture employers, two of the members appointed shall be representatives of organized agricultural labor and the three additional members, one of whom shall be the chairman of the board, shall be appointed as representatives of the general public. The term of office of the members shall be five years. Upon the initial appointment, one of the labor representatives shall be appointed for a term of one year, one of the representatives of the general public shall be appointed for a term of one year, one of the agricultural representatives shall be appointed for a term of two years, one of the representatives of the general public shall be appointed for a term of two years, one of the agricultural representatives shall be

appointed for a term of three years, one of the labor representatives shall be appointed for a term of four years and one of the public members of the board shall be appointed for a term of five years. Any individual appointed to fill a vacancy of any member shall be appointed only for the unexpired portion of the term of the member he is succeeding. Members of the board may be removed from office by the governor upon notice and hearing for neglect of duty or malfeasance in office, but for no other cause.

C. Two alternate members shall be appointed to the board by the governor. One of the alternates shall be appointed as a representative of organized agricultural labor and the other as a representative of agriculture. Alternates shall be appointed for terms of five years. Any individual appointed to fill a vacancy of any alternate shall be appointed only for the unexpired portion of the term of the alternate he is succeeding. Alternates may be removed from office by the governor upon notice and hearing for neglect of duty or malfeasance in office, but for no other cause. No alternate shall participate in deliberations of the board except in the absence of a board member representing his area of interest.

D. There shall be a general counsel of the board who shall be appointed by the governor. The general counsel shall be the exclusive legal representative of the board, shall have final authority, on behalf of the board, with respect to the investigation of charges and the issuance of complaints under § 23-1390 and with respect to the prosecution of such complaints by the board, and shall have such other duties as the board may prescribe or as may be provided by law. The gen-

eral counsel shall appoint such assistants as shall be needed to carry out the work of the office.

E. A vacancy on the board shall not impair the right of the remaining members to exercise all of the powers of the board and four members shall at all times constitute a quorum of the board. The board shall have an official seal which shall be judicially recognized.

F. The principal office of the board shall be in the city of Phoenix, but it may meet and exercise any or all of its powers at any other place.

G. The board may meet in executive session upon the decision of a majority of the members of the board.

H. Meetings of the board may be called by the chairman or by a majority of the members of the board by giving written notice to the chairman who shall notify all the members of the board as to time and place of the board meeting.

§ 23-1387. *Powers and duties*

A. The board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the state. A member of the board who participates in any such inquiry shall not be disqualified from subsequently participating in a decision of the board in the same case.

B. The board shall make and may from time to time amend and rescind, in the manner prescribed by law, such rules and regulations as may be necessary to carry out the provisions of this article.

C. The board may also establish offices in such other cities as it shall deem necessary and shall determine the region to be served by such offices. The board may delegate to the heads of these offices as it deems appropriate its powers under § 23-1389, to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, to determine whether a question of representation exists and to direct an election by a secret ballot and certify the results of such election within ten days. The board may review any action taken pursuant to the authority delegated under this subsection by any regional officer upon a request for a review of such action filed with the board by any interested party. Any such review made by the board shall not, unless specifically ordered by the board, operate as a stay of any action taken by the regional officer. The entire record considered by the board in considering or acting upon any such request or review shall be made available to all parties prior to such consideration or action, and the board's findings and action thereon shall be published as a decision of the board.

§ 23-1388. *Officers and employees of the board*

A. The board shall have authority to appoint an executive secretary and such attorneys, hearing officers, trial examiners and other employees as it may from time to time find necessary for the proper performance of its duties. Compensation for all such personnel shall be as determined pursuant to § 38-611.

B. The board may not employ any attorney for the purpose of reviewing transcripts of hearings or preparing drafts of opinions, except that any attorney employed for assignment as a legal assistant to any

board member may for such board member review such transcripts and prepare such drafts.

C. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the board or his legal assistant, and no trial examiner shall advise or consult with the board with respect to exceptions taken to his findings, rulings or recommendations.

D. Attorneys appointed under this section may, at the discretion of the board, appear for and represent the board in any case in court.

§ 23-1389. *Representatives and elections*

A. Representatives selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in a unit appropriate for such purposes shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. If ratification of any such contract is required, the right to vote in such ratification shall be limited to the employees in the bargaining unit. Any individual agricultural employee or a group of agricultural employees may at any time present grievances to their agricultural employer and have such grievances adjusted, without the intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect. The bargaining representative shall be given opportunity to be present at such adjustment.

B. The board shall decide in each case whether in order to ensure to employees the fullest freedom in exercising their rights the unit appropriate for the purposes of collective bargaining shall consist of either all temporary agricultural employees or all permanent agricultural employees of an agricultural employer working at the farm where such employer grows or produces agricultural products or both. In making unit determinations the extent of a union's extent of organization shall not be controlling. Principal factors should be the community of interest between employees, same hours, duties and compensation, the administrative structure of the employer and control of labor relations policies.

C. The board shall investigate any petition, and if it has reasonable cause to believe that a question of representation exists shall provide for an appropriate hearing upon due notice, when such petition has been filed in good faith in accordance with such regulations as may be prescribed by the board:

1. By an agricultural employee or group of agricultural employees or any individual or labor organization acting in their behalf alleging that thirty per cent or more of the number of agricultural employees in the unit in question either wish to be represented for collective bargaining and that their employer declines to recognize their representative or assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative is no longer a representative.

2. By an agricultural employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative or that an individual or labor organization which has previously been certified as the bargaining representative is no longer a representative.

D. If the board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. If a second labor organization files a petition for an election alleging that thirty per cent or more of the employees in the unit in question desire to be represented by that labor organization, then the board shall require that the names of both labor organizations shall appear on the ballot. In any election the voters shall be afforded the choice of "no union". If in a representational election where more than one union is on the ballot, and none of the choices receives a majority vote, a second election shall be held. The second election shall be between the union receiving the highest number of votes and "no union". In any election a labor organization shall obtain a majority of all votes cast in that election in order to be certified as the bargaining representative of all the employees in that unit.

E. In determining whether or not a question of representation exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought. In no case shall the board deny a labor organization a

place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with § 23-1390.

F. Within five days of receipt of such a petition, the agricultural employer may file a challenge to such petition on the ground that the authorization for the filing of such petition is not current or that such authorization has been obtained by fraud, misrepresentation or coercion. Such petition shall not act to stay the election proceeding but if it is thereafter determined that the authorizations are not current or obtained by fraud, misrepresentation or coercion the petition will be dismissed.

G. No election shall be directed or conducted in any bargaining unit or any subdivision thereof within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the board shall find are consistent with the purposes and provisions of this article in any election conducted within three months after the commencement of the strike. Any agricultural employee who is found to have sought or accepted employment only for the purpose of affecting the outcome of an election shall not be eligible to vote in an election conducted pursuant to the provisions of this article for a period of twelve months from the date of that election.

H. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the board.

I. The agricultural employer, within ten days after an election is directed by the board or a consent election agreement is approved by the board and on request of the board, shall furnish to the board a list of agricultural employees in the bargaining unit who are qualified to vote, and such a list shall be made available to the organizations or other interested employees involved in the election.

J. Upon the filing with the board, by thirty per cent or more of the agricultural employees in a bargaining unit covered by a certification or by an agreement between their employer and a labor organization made pursuant to § 23-1385, of a petition alleging the desire that such representation authority be rescinded, the board shall conduct an election by secret ballot of the employees in such unit and certify the results thereof to the labor organization and to the employer.

§ 23-1390. *Prevention of unfair labor practices*

A. The board may, as provided in this section, prevent any person from engaging in any unfair labor practice.

B. When it is charged that any person has engaged in or is engaging in any such unfair labor practice, the board, or any agent or agency designated by the board for such purposes, may issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of such complaint. No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy

thereof upon the person against whom such charge is made, unless the person so aggrieved was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the board or the member, agent, or agency conducting the hearing, any other person may be allowed to intervene in the proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the superior courts of the state under the rules of civil procedure applicable to such courts. All proceedings shall be reported by a phonographic or magnetic tape recorder.

C. The testimony taken by the board or such member, agent, or agency shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the board determines that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take

such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this article. Where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. Such order may further require such person to make reports from time to time showing the extent to which he has complied with the order. If upon the preponderance of the testimony taken the board determines that the person named in the complaint has not engaged in or is not engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue an order dismissing the complaint. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. If the evidence is presented before a member of the board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the board may authorize, such recommended order shall become the order of the board and become effective as therein prescribed.

D. Until the record in a case is filed in a court, as provided in this section, the board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any findings or order made or issued by it.

E. The board may petition any superior court in any county wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order. Upon the filing of such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and may grant such temporary relief or restraining order as it deems just and proper, and may make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. An objection that has not been urged before the board, or a member, agent or agency thereof, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, or a member, agent, or agency thereof, the court may order such additional evidence to be taken before the

board, its member, agent, or agency, and to be made a part of the record. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review as provided by law.

F. Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in any superior court in the county wherein the unfair labor practice in question was alleged to have been engaged in by filing in such court a written petition praying that the order of the board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the board. Upon the filing of such petition the court shall proceed in the same manner as in the case of an application by the board under subsection E of this section, and shall have the same jurisdiction to grant to the board such temporary relief or restraining order as its deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. The

findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

G. When an order of the board made pursuant to this section is based in whole or in part upon facts certified following an investigation pursuant to § 23-1389, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection E or F of this section, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript. The court shall not enforce any order of the board which rests, in whole or in part, upon evidence adduced from witnesses who have not testified under oath and who have not been subject to cross-examination by opposing parties.

H. The commencement of proceedings under subsection E or F of this section shall not, unless specifically ordered by the court, operate as a stay of the board's order.

I. Petitions filed under this article shall be heard expeditiously, and if possible within ten days after they have been docketed.

J. The board may, upon issuance of a complaint as provided in subsection B charging that any person has engaged in or is engaging in an unfair labor practice, petition the superior court in any county wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts

business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper.

K. When it is charged that any person has engaged in an unfair labor practice, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the board, petition the superior court in the county wherein the unfair labor practice in question has occurred, is alleged to have occurred, or wherein the person alleged to have committed the unfair labor practice resides or transacts business, for appropriate injunctive relief pending the final adjudication of the board with respect to such matter. Upon the filing of any such petition the superior court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law, provided that no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon the filing of any such petition the courts shall cause notice thereof to be

served upon any person complained against in the charge and such person, including the charging party, shall be given an opportunity to appear in person or by counsel and present any relevant testimony. For the purposes of this subsection, superior court shall be deemed to have jurisdiction of a labor organization either in the county in which such organization maintains its principal office, or in any county in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit.

§ 23-1391. *Investigatory powers*

A. The board, or its duly authorized agent or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The board, or any member thereof, shall upon application of any party to such proceedings forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the board to revoke, and the board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings,

or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the board, or any agent or agency designated by the board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the state of Arizona, at any designated place of hearing.

B. In case of contumacy or refusal to obey a subpoena issued to any person, the superior court of the county within the jurisdiction of which the person guilty of contumacy or refusal to obey is found or resides or transacts business shall, upon application by the board, have jurisdiction to issue to such person an order requiring such person to appear before the board, or a member, agent or agency thereof, to produce evidence if so ordered, or to give testimony touching the matter under investigation or in question. Failure to obey such order of the court may be punished by the court as contempt.

C. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be

exempt from prosecution and punishment for perjury committed in so testifying.

D. Complaints, orders and other process and papers of the board, or a member, agent, or agency thereof, may be served either personally, by registered or certified mail, by telegraph or by leaving a copy thereof at the principal office, place of business or residence of the person required to be served. The verified return by the individual personally serving or leaving the copy, setting forth the manner of such service, and the return post office receipt or telegraph receipt therefor, when registered or certified, and mailed or telegraphed as provided in this subsection, shall be proof of service. Witnesses summoned before the board, its members, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the superior courts and witnesses whose depositions are taken and the persons taking the depositions shall severally be entitled to the same fees as are paid for like services in the superior courts.

E. The departments and agencies of the state, when directed by the governor, shall furnish the board, upon its request, all unprivileged records, papers and information in their possession relating to any matter before the board.

§ 23-1392. *Penalties*

Any person who wilfully resists, prevents, impedes or interferes with any member of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who violates any provision of this article is guilty of a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than one year, or both.

Provided, however, that none of the provisions of this section shall apply to any activities carried on outside the state of Arizona.

§ 23-1393. *Court jurisdiction*

A. Any person who is aggrieved or is injured in his business or property by reason of any violation of this article, or violation of an injunction issued as provided in this section, may sue in any superior court having jurisdiction of the parties for recovery of any damages resulting from such unlawful action, regardless of where such unlawful action occurred and regardless of where such damage occurred, including costs of the suit and reasonable attorney fees. Upon the filing of such suit the court shall also have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper. Petitions for injunctive relief or temporary restraining orders shall be heard expeditiously. Petitions for temporary restraining orders alleging a violation of § 23-1385 shall be heard forthwith and if the petition alleges that substantial and irreparable injury to the petitioner is unavoidable such temporary restraining orders may be issued pursuant to Rule 65 of the Arizona Rules of Civil Procedure.

B. In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the

unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues. Any agricultural employer shall be entitled to injunctive relief accorded by Rule 65 of the Arizona Rules of Civil Procedure upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities. For the purpose of this subsection, an agricultural commodity or commodities for human consumption with a market value of five thousand dollars or more shall constitute commercial quantities.

C. For the purpose of this article, superior courts shall have jurisdiction of a labor organization in this state if such organization maintains its principal office in this state, or if its duly authorized officers or agents are engaged in promoting or protecting the interests of agricultural employee members or in the solicitation of such prospective members in this state.

D. The service of summons, subpoena, or other legal process of any superior court upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

E. Any labor organization which represents employees as defined in this article, and any agricultural employer, shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of this state.

F. For the purposes of this article, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. Nothing in this section shall be deemed to preclude an agent being sued both in his capacity as an agent and as an individual.

§ 23-1394. *Scope of article*

The provisions of this article shall apply only to such persons, labor organizations or activities as are not within the jurisdiction of the National Labor Relations Act[3] or the jurisdictional guidelines established by the national labor relations board.

§ 23-1395. *Limitations*

A. Nothing in this article, except as otherwise specifically provided, shall be so construed as to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

B. Nothing in this article shall prohibit any individual employed as a supervisor from becoming or

[3] 29 U.S.C.A. § 151 et seq.

remaining a member of a labor organization, but no employer subject to this article shall be compelled to deem such supervisors as agricultural employees for the purpose of any law, either national or local, relating to collective bargaining.

Arizona Agricultural Employment Relations Board Regulations

R4-2-19. Elections: Hearings

Upon the filing of a petition for election, the Board shall direct a hearing be held in accordance with Section 23-1389(C), (D) and (E) of the Act, and, if it finds after such hearing that a question concerning representation does exist, shall order an election be held. Appeal of a determination that a question concerning representation exists shall not act to stay the election. In the event issues raised at the hearing, excepting any question concerning representation, cannot be resolved prior to the election, certification of the results of said election shall be withheld pending a determination of such unresolved issues by the Board.

R4-2-22 Conduct of Hearing

A. Hearings shall be conducted by a hearing officer and shall be open to the public. At any time a hearing officer may be substituted for the hearing officer previously presiding: Provided absent agreement by the parties, the hearing shall be held de novo. It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the hearing officer on

behalf of the Board may discharge his duties under Section 1389(D) of the Act. A copy of the decision shall be served on all parties.

B. The hearing officer may, in his discretion, continue the hearing from day to day or adjourn it to a later date or a different place, by announcement thereof at the hearing or by other appropriate notice.

C. The hearing officer may proceed, either on the record or in writing, to determine whether a question concerning representation exists and direct an election when appropriate, determine the unit appropriate, and determine such other issues as are raised at the hearing, stating his findings and conclusions. The hearing officer may allow oral argument, briefs to be submitted, or both. Where briefs are to be submitted, any party desiring to do so shall file the original and one copy thereof within seven (7) days after the close of the hearing provided however, that prior to the close of the hearing and for good cause shown, the hearing officer may grant an extension of time not to exceed an additional seven (7) days. Copies thereof shall be served simultaneously on all other parties to the proceeding. No reply briefs may be filed except upon special leave of the hearing officer.

D. All motions including the motions for intervention shall be in writing, or if made at the hearing, be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. An original and two (2) copies of written motions shall be filed and a copy thereof immediately shall be served on the other parties to the proceeding. Motions made prior to the transfer of the case to the Board shall be filed with the hearing officer. After the transfer of the case to the Board all motions shall be filed with the Board. The hearing officer may rule upon all motions or he may refer the motion to the Board. If the hearing officer, prior to the close of the hearing, grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling with the Board. The hearing officer shall rule, either orally on the record or in writing, upon all motions filed with him or made at the hearing.

E. Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which said person claims to have an interest in the proceeding. The Board or the hearing officer, as the case may be, may be order permit intervention in person or by counsel or by other representative to such extent and upon such terms as he may deem proper, and such intervenor shall thereupon become a party to the proceedings.

F. All motions, rulings and orders shall become part of the record. Unless expressly authorized by the Rules and Regulations, the rulings by the Board or by the hearing officer shall not be appealed directly to any court of this state but shall be considered or reconsidered by the Board on appropriate appeal.

G. A party to a proceeding may, because of extraordinary circumstances, move after the close of a hearing for a reopening of the record, or move after the decision for reconsideration or rehearing, except that no motion for reconsideration or a rehearing will be entertained pursuant to this subsection by the Board with respect to any matter which could have been but was not raised at the original hearing. A motion for reconsideration shall state with particularity the material

error claimed and with respect to any finding of material fact shall specify the page of the record relied upon. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movent alleged to result from such error. A sought to be adduced, why it was not presented previously, and what evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes sould have been taken at the hearing will be taken at any further hearing. All motions pusuant to this subsection shall be filed within five (5) days, or such further period as the Board may allow, after service of the decision. The filing and pendency of a motion under this provision shall not, unless so ordered, operate to stay the effectiveness of any action taken or directed to be taken, except that if the motion states with particularity that the granting thereof will effect the eligibility to vote of specific voters the ballots of such employees shall be challenged and impounded in any election conducted while such motion is pending.

H. Appeal of any determination by the hearing officer shall be made to the Board within ten (10) days after receipt of the hearing officer's determination, or such additional time as the Board may grant. Appeals shall be in writing with an original and six (6) copies filed with the Board, and a copy served simultaneously on all other parties. Any party may, within seven (7) days of such appeal, file with the Board an original and six (6) copies of a statement in opposition to such appeal, together with a statement of service of opposition on the other parties. The Board may deny the appeal without awaiting a statement in opposition

thereto. An appeal shall not serve to stay the election. Upon appeal the Board shall forthwith either upon the record or after further hearings, as it may decide, determine the issues submitted to it and affirm or reverse the determination of the hearing officer in whole or in part, or make such other disposition of the matter as it deems appropriate.

I. In any case in which the hearing officer believes the proceeding raises questions which should be decided by the Board, he may issue an order, on the record or in writing, transferring the case to the Board for decision.

J. The parties may, at any time, waive their rights to appeal to the Board. Failure to appeal shall preclude such parties from relitigating in any related proceeding, including unfair labor practice proceedings, any issue which was or could have been raised in the representation proceeding. Denial of an appeal by the Board shall constitute an affirmance of the hearing officer's decision, and shall also preclude relitigation of any such issues in any related unfair labor practice proceeding.

K. Any appeal or statement in opposition must be a self-contained document enabling the Board to rule on the basis of its contents. Such document shall not raise any issue or allege any facts which could have been but were not timely presented to the hearing officer.

Supreme Court, U.S.
FILED
SEP 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO AFFIRM

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,
versus
UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court, appellees[1] move that the final judgment and decree of the three-judge district court be affirmed on the grounds that

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[1] Appellees are United Farm Workers National Union (presently United Farm Workers of America) (UFW), on behalf of itself and its members, Gustavo Gutierrez an agent of the UFW, Ruben Alaniz and Matilda Varela, on behalf of themselves and all other Arizona farm workers, and Wendy Rose, a supporter of the UFW. Appellees' motion for class certification was not decided by the court below.

the questions raised in the appellants' Jurisdictional Statement are insubstantial and that the decision below is so plainly correct as not to warrant further review by this Court.

OPINION BELOW

The opinion and judgment of the district court found A.R.S. §§ 23-1381 *et.seq.* unconstitutional and enjoined their enforcement. That opinion is reported at 449 F.Supp. 449 and is reprinted in the Appendix of appellants' Jurisdictional Statement.

QUESTIONS PRESENTED

1. Does an election procedure, created by the state and made the exclusive means to union recognition, which by definition and actual operation disenfranchises a substantial number if not a majority of the persons it purports to enfranchise, violate the First and Fourteenth Amendment rights of those persons so deprived of their right to vote and associate?

2. Does a statute which calls for prior restraints upon the communication of "dishonest, untruthful and deceptive publicity," plus the imposition of criminal penalties upon a labor organization and its members who undertake such communications, prevent the uninhibited, robust and wide-open public debate protected by the First Amendment particularly in the area of labor relations, when that statute contains no narrowing provisions requiring a showing of actual malice on the part of the speakers?

3. Whether a provision of a lengthy and frequently overbroad regulatory statute which transforms any violation of

that statute into a crime, thereby making hundreds of unfair labor practices also punishable as crimes, prohibits conduct protected by the First Amendment and fails to punish only by means of clear provisions that instruct the ordinary person how to avoid unlawful conduct?

4. Does a statute which permits an employer to deny access under all circumstances to union representatives who wish to communicate with workers located in his fields or labor camps provide for that constitutionally required accommodation between speech rights and property rights required by this Court in the labor context?

5. Whether a labor relations statute which gives to the employer the unilateral right to compel a labor organization with which he has a dispute to submit that dispute to compulsory binding arbitration violates the Due Process Clause of the Fourteen Amendment?

6. Should inter-dependent parts of a labor relations statute which claims to attempt a delicate balance between competing interests of employers and employees continue to operate when other portions of that statute which chiefly established that "balance" have been held unconstitutional?

7. Have a labor organization and its members who have had a criminal regulatory statute extensively enforced against them and who have been severely and irreparably injured by that enforcement asserted a sufficiently direct threat of personal detriment and adequately demonstrated that they are parties against whom that statute directly operates so as to satisfy the Article III case or controversy requirement—particularly when their challenge to that statute largely alleges facial overbreadth restricting First Amendment freedoms?

8. In a civil rights action alleging facial invalidity of several provisions for violating First and Fourteenth Amend-

ment rights should a federal court abstain when (1) the meaning and operation of those provisions are certain on their face, (2) they do not—without an actual rewriting of the statute—lend themselves to interpretations by state courts which would avoid the constitutional issues and (3) there is little likelihood of an expeditious state court proceeding that would resolve the constitutional questions raised?

STATEMENT OF THE CASE

In May of 1972 the Arizona legislature passed the Arizona Agricultural Employment Relations Act, A.R.S. § 23-1381 *et.seq.*, (hereafter AERA or Act). Fundamentally, the AERA placed sweeping restrictions upon the use, by farm workers and labor organizations representing them, of traditional activities like picketing, strikes and boycotts. In return the Act established a secret ballot election process which served as the exclusive means to obtain union recognition and representation.

Immediately after the Act took effect in August 1972, the Agricultural Employment Relations Board (hereafter Board) was appointed, a staff was hired and enforcement of the AERA was initiated by both the state and private employers. Within the first year of operation at least one agricultural employer relied upon the AERA in his successful efforts to obtain an injunction against strike activity by the appellee union. A retail grocery chain also invoked several provisions of the Act in its civil suit to enjoin the handbilling and oral conversation conducted at its various stores by the appellee UFW and its members in furtherance of its boycott activities.

In August of 1973 the plaintiff-appellees filed their

Amended Complaint in this action alleging that eleven major provisions of the Act on their face violated the First and Fourteenth Amendments. They claimed that at least three other provisions were unconstitutional when applied in the context of seasonal and migrant farm workers. Finally it was asserted that the entire Act violated the Equal Protection Clause, since the Act made arbitrary distinctions between classes of agricultural employees lacking any rational basis.

By the time the case went to trial in January 1977 the record revealed at least 20 different occasions when the AERA had been applied in either civil actions or administrative Board proceedings, including numerous proceedings directed against the appellee UFW and its members.

The three-judge panel conducted a four day trial which included testimony from witnesses provided by both sides extremely knowledgeable in the field of agriculture and labor relations. The judges found several of these persons qualified as experts in these fields and credited their testimony as such. In addition the court was presented with two comprehensive stipulations relevant to major issues in the case. One was a detailed stipulation relating to enforcement of the Act; the second was an extensive stipulation regarding the seasonal nature of agriculture in Arizona, including detailed information about the growing season for numerous crops, the number of persons employed in each, and information related to the manner of recruiting and utilizing those persons.[2]

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[2] Both stipulations are part of the record. The first is referred to herein as *Stipulation Regarding Enforcement:* its full caption reads *Stipulated Statement of Status of Past and Pending Actions Taken in Accordance With The Agricultural Employment Relations Act.* The second is captioned *Stipulation Regarding Harvest and Pre-Harvest Seasons;* herein it is cited as *Stipulation on Seasonality.*

Testimony was presented regarding the unique circumstances extant in agricultural labor—particularly those emanating from its seasonal and migrant nature—and the peculiar problems that result therefrom when agricultural employees attempt to organize. The court also heard and credited testimony from expert witnesses relevant to the operation of the AERA, particularly the election provisions, in the context of this unique industry.

The record also contained uncontradicted testimony as to the extensive adverse effects that five years' of enforcement of the AERA had had upon both Arizona farm workers and upon the appellee union.

After extensive post-trial briefing the judges held that four provisions of the Act on their face violated the First and Fourteenth Amendments. They also found that the election procedures operated to disenfranchise a substantial number if not a majority of farm workers and denied them the freedom to organize a union guaranteed by the First Amendment.

The court further found that since those five provisions were obviously critical to the intended and meaningful operation of the statute, without them the remainder of the Act was inoperable. Thus, they held that these provisions were inseparable and the entire Act would fall.

ARGUMENT

Introduction

The Arizona Agricultural Employment relations Act was born amidst statewide controversy and heated political debate. The brainchild of the intervening Arizona Farm Bureau Federation and grower associations who drafted it and invested heavily in securing its passage,[3] the AERA received widespread criticism from its inception for its blatantly one-sided approach to the delicate area of agricultural farm labor relations.

Clergy, labor leaders and civil rights advocates denounced its heavy-handed deprivations of farm workers' rights of speech and association. Legal scholars amply demonstrated how the AERA, supposedly "patterned after" the National Labor Relations Act, in fact contained numerous modifications of the NLRA, all of which tipped the delicate balance accomplished in the NLRA in favor of Arizona's agricultural employers while seriously infringing upon fundamental rights of farm workers in the process.[4]

So outraged was a large segment of the Arizona public at the adoption of the Act that a recall campaign was launched against Arizona's governor for his part in its passage. In the ten months following the passage of the Act, far more

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[3] See p. 13, Motion to Intervene, October 1, 1973.

[4] See *State Regulation of Agricultural Labor Relations—The Arizona Farm Labor Law—An Interpretative and Comparative Analysis*, Warren H. Cohen and Jonathan Rose, Arizona State University Law Journal Vol. 1973, pp. 315 *et.seq.*; *State Regulation of Agricultural Labor Relations—Arizona Farm Labor Law—A Constitutional Analysis*, Jonathan Rose, Arizona State University Law Journal, Vol. 1973, pp. 373 *et.seq.*

than that number of signatures necessary for placing the recall on the ballot were collected.

However, perhaps the most revealing indicator of the absence of any real protection for farm workers in the Act was the Act's complete failure to inspire worker confidence in its use. The record shows that workers and labor organizations petitioned for only seven elections in five years under the AERA, while in California, on the other hand, farm workers and labor groups representing them, including the appellee UFW, petitioned for almost 400 elections in the first five months of the operation of the California Agricultural Relations Act.[5]

After over a year of enforcement of the AERA, the appellees, who had been the target of almost all that enforcement, filed their Amended Complaint in this action. In that Complaint they pointed to some 11 provisions of the Act which because of their facial overbreadth deprived farm workers and labor organizations representing them of the rights of speech and association guaranteed by the First and Fourteenth Amendments. Examples of sections which were challenged as reflecting a total disregard for First Amendment freedoms included:

1. The Act's sweeping restrictions on boycott activity, both primary and secondary, reaching so far as to prohibit oral conversations with consumers and retailers [§§ 23-1385(B)(6),(7) and (8)];

2. Provisions of the AERA which enabled agricultural employers to obtain total bans against strikes and picketing, including temporary restraining orders without notice [§ 23-1385(B)(12) and § 23-1393(B)];

[5] Cal. Labor Code § 1140 *et. seq.*

3. Restrictions, enforced by criminal penalties, upon the topics a labor organization was permitted to raise in collective bargaining [§§ 23-1384, 23-1385(B)(11)];

4. The total denial of access of union representatives to an employer's premises [§ 23-1385(C)];

5. The Act's limiting of the right to strike to only a majority of an agricultural employer's employees [§§ 23-1385(B)(13)];

6. The AERA's attempt to limit the scope of the labor dispute, and the rights concomitant to such a dispute, to an employer and his immediate employees [§ 23-1382(6)];

7. The application of criminal penalties for any violations of the Act, thus transforming the lengthy regulatory statute into an overbroad and vague criminal statute [§ 23-1392].

Most of the above-cited provisions of the law conflicted directly with earlier decisions of this Court, including *A.F.L. v. Swing*, 312 U.S. 321 (1941); *N.L.R.B. v. Babcock and Wilcox*, 351 U.S. 105 (1956); *N.L.R.B. v. Fruit and Vegetable Packers*, 377 U.S. 58 (1964); *N.L.R.B. v. Servette*, 377 U.S. 46 (1964); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175 (1968).

All of these sections were designed to deny farm workers the use of those communicative tools recognized as essential to workers in labor disputes, *Thornhill, supra*, and all effectively deprived appellees of constitutional rights of speech and association.

In addition to those sections which suffered from facial overbreadth, the AERA purported to provide an election procedure by which seasonal farm workers could select collective bargaining representatives. However, this procedure

was designed, and in fact operated, to disenfranchise most of the workers that the law's backers claimed it would serve. [§ 23-1389][6]

Finally, the AERA made distinctions between agricultural employees to be severely regulated and those not to be regulated—distinctions which bore no rational relationships to the purported objective of the Act [§ 23-1382(1)]. Plaintiff-appellees alleged such arbitrary and unreasonable distinctions among farm workers constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528 (1973); *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

In view of the blatant constitutional defects which abound throughout the inter-related parts of the Act, there can be no question but that the three-judge panel below decided correctly in finding the entire Act unconstitutional. Nor is it surprising that the district court invalidated the entire Act after a specific discussion of only five of the many sections of the law challenged. As shown below, those sections were critical to the operation of this legislative scheme and were among those provisions most violative of constitutional rights.

By focusing on these five central issues the district court demonstrated a sound basis for invalidating the entire Act while avoiding the need to rule upon the longer list of constitutional questions raised in the Amended Complaint. For the same reason it is unnecessary for appellees at this time to discuss in detail challenged provisions other than those five specifically addressed by the three-judge panel.

1. *Exclusion Of A Substantial Number Of Farm Workers From An Exclusive Recognition Procedure Clearly Violates First and Fourteenth Amendment Rights.*

[6] See § 1 below and App. A at 14-30, Jurisdictional Statement.

Under the provisions of the AERA, the Arizona legislature established an exclusive state-regulated procedure for determining union recognition and representation for farm workers. The evidence produced at the trial demonstrated that these procedures, by both definition and operation, excluded a substantial number of farm workers from seeking and obtaining union recognition and representation, thus preventing them from exercising their rights to organize guaranteed by the First and Fourteenth Amendments to the United States Constitution.

As held by the court below, it was the creation of this initial barrier to the exercise of the right to organize and freedom of speech and assembly, which was the fatal flaw in the Arizona Act and which compelled the invalidation of § 23-1389 and the entire statute.

A. *The AERA establishes a unique exclusive reliance upon state-conducted elections.*

Unlike the NLRA, the Arizona Act funnels all union recognition and representation demands through a state operated election procedure. The AERA limits recognition to "representatives *selected by a secret ballot* . . ." § 23-1389 (A),[7] and expressly restricts the employer's duty to bargain collectively to "a representative of his agricultural employees [who] has been determined by means of a valid *secret ballot election.*" § 23-1385(A)(5).

Thus the AERA eliminates alternative means of obtaining recognition, e.g., through authorization cards, and

[7] *cf.* 29 U.S.C. § 159(a) which determines recognition based upon "representatives *designated* or selected by secret ballot."

provides agricultural employers with a means to compel workers to seek such representation solely through the statutory election procedures. In addition all recognitional picketing and boycott activity is prohibited as soon as a petition for election is filed and remains prohibited, regardless of the length of time, until an election is held. § 23-1385(B)(12)(c).[8] Agricultural employers themselves are free to invoke this procedure through the unrestricted right to file a petition for an election when faced with any recognitional activity. § 23-1389(C)(2).[9]

It is this unprecedented prohibition upon recognition activity which establishes the winning of a secret ballot election under the AERA as the bottleneck through which all union organizing must pass. As held by the court below, the election section, § 23-1389, "is the threshold over which employees must pass if they desire to exercise their constitutional right to ' . . . organize . . . , take concerted action . . . through representatives of their own choosing' " (App. A at 25, Jurisdictional Statement).

In examining this threshold created by the AERA the three-judge panel found that the evidence presented established that in fact a substantial and significant number of farm workers were prevented from exercising their fundamental First Amendment freedoms.[10]

[8] *cf.* 29 U.S.C. § 158(b)(7)(c) and *Dayton Typographical Union No. 57 v. NLRB*, 326 F.2d 634 (D.C. Cir. 1963).

[9] This provision has been invoked in two of the nine petitions filed under the AERA. The employer's petition was withdrawn in each case once the picketing stopped.

[10] Appellants' contention that the district court's holding raises constitutional doubts concerning the election procedures of the NLRA is clearly unfounded. The finding by the panel that NLRA-like election procedures are unsuitable for a unique group like agricultural employees does not undermine those procedures themselves. The NLRA, of course, specifically excludes agricultural workers from its coverage, 29 U.S.C. § 152(3).

Based upon the testimony presented, the court determined that to seek an election there must be a three to six week initial organizing period and that once a petition was filed, the administrative procedures prior to holding the election required an additional six to seven weeks for completion. When placed in the context of a four to six week seasonal harvest for major Arizona crops—with only a two to four week period of "peak" employment—the court reached the obvious conclusion that: "the entire [election] process cannot take place before a majority of the employees finish their work and leave their place of employment." (Finding of Fact, App. at A 18, Jurisdictional Statement.)

The evidence further established not only the ineffectiveness but also the actual inoperability of these procedures. In the five and one-half years the AERA was in effect only nine petitions were filed for elections. Of these only three resulted in elections—all in situations where the employer consented. The dismal record of the AERA is highlighted when compared to the experience in neighboring California where the record showed that more than 400 elections were held in the first five months of the operation of the California Agricultural Relations Act, i.e., September 1975 to

In addition, while it is true that the lengthy administrative procedures of the two Acts, from the filing of a petition to the holding of an election are "virtually identical," the provisions governing recognitional picketing and recognition based upon authorization cards are almost diametrically opposed—the AERA prohibiting the use of both. Likewise the NLRA contains no legislatively mandated exclusions from the election process such as the AERA's exclusion of workers under the age of 16 or those who have not worked two consecutive years. These and numerous other differences between the two statutes preclude such a superficial application of the district court's ruling to the NLRA.

February 1976, upon petitions by the appellee UFW or the Teamsters Union, each vying to represent farm workers.

The comparable inoperability of the election procedures in the Arizona Act was reflected in the record. The four remaining petitions of the total seven were filed by the Teamsters Union at lettuce ranches in the 1974 fall season and were contested by the employers. Three of these petitions were subsequently withdrawn at the end of the season prior to the scheduling or holding of any elections. The fourth petition resulted in the scheduling of an election for a date which was one week after the end of the harvest season and at a time when the majority of employees had left the ranch. That petition was also withdrawn at the end of the season. (See *Stipulation Regarding Enforcement*, paragraphs 4, 5, and *Stipulation on Seasonality*, Cactus Ranch Data, 1974).

B. *The excessive length of the election procedures prevents farm workers from exercising First Amendment rights.*

These two central findings of fact by the three-judge panel—(1) that the election procedures are the single threshold over which Arizona farm workers must pass to exercise their rights to organize a union and (2) that the time necessary to accomplish this is longer than the employment period of most Arizona farm workers—inescapably compel the conclusion reached by the district court invalidating the recognition provisions of § 23-1389. This conclusion is neither novel nor unprecedented and is so obviously required by the evidence and established legal principles that further review by this court is unnecessary. *Healy v. James*, 408 U.S. 169 (1972); *Williams v. Rhodes*, 393 U.S. 23 (1968); *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama, ex rel*

Patterson, 357 U.S. 449 (1958); *Thomas v. Collins*, 323 U.S. 516 (1945); *Hague v. CIO*, 307 U.S. 496 (1939); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).[11]

C. *The court was obviously correct in holding that the statutory restrictions on eligible employees infringes upon the First Amendment rights of Arizona farm workers.*

The Arizona Act, again unlike the NLRA, legislatively excludes certain farm workers from the election process through the definitions of eligible employees, in particular those under 16 years of age and those not employed by the same grower during the "preceding calendar year."[12] The

[11] The growers and state never directly dispute the analysis or legal conclusions of the three-judge panel on these central issues which the court found to be the fatal defects in the Act. Rather the thrust of the appellants' attack upon the district court's ruling is in effect to question the lower court's findings of fact, and to characterize the decision as implying that NLRB-style elections are unconstitutional. However, the court's findings of fact are not a proper subject for relitigation on appeal and as noted above, the enormous differences in determining union recognition under the NLRA and the AERA preclude the application of the district court's opinion to NLRB elections. With respect to the appellants' claim that the court interfered with legitimate policy choices of the legislature, the court has no more than re-affirmed the long-established principle that where state regulations become so restrictive and burdensome that they effectively prevent a large number of persons from exercising their First Amendment rights, they run afoul of the Constitution.

[12] Persons under 16 years of age have been permitted to vote in NLRB elections where they meet the criteria of "employees," *Kroder-Reubel Co.*, 72 NLRB 240 (1947), and the evidence established that a substantial number of regularly employed farm workers are under 16 years of age. The appellees also challenge the exclusion from the Act and election procedures of farm workers "engaged in hauling or stitching functions" § 23-1382(1)(g), on the grounds that the exclusion is arbitrary and irrational. The district court found it unnecessary to rule

growers and state have strenuously objected to the district court's reliance upon the plain meaning of the term "preceding calendar year"[13] to conclude that the AERA requires employment in two successive years. The appellants would prefer to read this section as requiring employment sometime during a 365-day period before a petition or an election, i.e., the day before or one year before. Such a reading however, destroys all meaning of the phrase, and rather than interpret the AERA, seeks to strike existing language in order to defend its constitutionality.

While there might be specific circumstances or cases where the NLRB might set similar limitations on employee eligibility, the fact that the AERA legislatively requires these exclusions *in all cases* reveals the truly invidious nature of that Act. The exclusion of workers under 16 from the elections and thus from passing over the threshold to exercise their constitutional rights flies in the face of the historical and legislatively more permissible use of child labor in agriculture and the rights of these workers to exercise their constitutionally guaranteed freedoms. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

Likewise the district court ruled correctly that the requirement that workers be employed for two successive seasons is totally unsuitable for that foremost seasonal and migrant work force—agricultural laborers—which the AERA is specifically designed to regulate. The only explanation for such absolute exclusions—and their actual

on these additional statutory exclusions of otherwise eligible employees. *Cf. Allied Chemical and Alkali Workers v. PPG Co.*, 404 U.S. 157 (1971)

[13] App. at A-27, Jurisdictional Statement; see also definition in Black's Law Dictionary.

impact—is that they were designed to limit the number of farm workers who can participate in unionization. And the three-judge panel so found:

> "These categories of employees eligible to vote set forth in the Act, would appear to be so defined as to preclude a significant and substantial number from participating in the collective bargaining process, from selecting representatives of their own choosing, given the migratory and transitory nature of agricultural employment." (App. at A-28, Jurisdictional Statement).

The imposition of such limits upon the rights to form, join and associate with a union is obviously unconstitutional and clearly justifies summary affirmance of the district court decision.

D. *The court was clearly correct in holding that the lack of alternatives where an election is impossible infringes upon First Amendment rights.*

While the election provision discussed above attempt to drown farm workers' organizational rights in a legal guagmire, the final nail in the coffin is provided by statutory prohibitions on a *Gissel*-type remedy of ordering collective bargaining where an employer has intentionally destroyed the possibility of a fair election despite a clear majority support for a union.[14] § 23-1385(A)(5), *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *J.P. Stevens & Co., Inc.*,

[14] A.R.S. § 23-1385(A)(5) states:

> ". . . Nothing in this article shall be construed as requiring an agricultural employer to bargain collectively until a representative of his agricultural employees has been determined by means of a valid secret ballot election."

There could be no more explicit prohibition upon *Gissel*-type bargaining orders unless the Act specifically referred to *Gissel*, and contrary to the contentions of appellants this is not an issue of "interpretation."

Gilistan Div. v. NLRB, 441 F.2d 514 (5th Cir. 1971). The result is that the AERA not only compels farm workers to rely exclusively upon election procedures, it then provides the employer with the power to prevent the workers from ever obtaining recognition through that procedure by using intimidation, coercion, firings or even physical force to destroy any possibility of a fair election. This result clearly makes a mockery of the AERA's ostensible policy that agricultural employees "shall be free to organize" as well as their constitutional rights to do so.

E. *The district court's decision is supportable on other grounds and raises no substantial questions for plenary review.*

While the district court's decision is well founded in the guarantees of freedom of speech, assembly and association of the First Amendment, it may be independently supported based upon the overlapping effect of the election procedures on farm workers' right to vote in a state-created election process. *Williams v. Rhodes*, 393 U.S. 323 (1968).

While the State of Arizona was not required to provide for these elections, it chose to do so and furthermore made those elections the exclusive means of exercising certain fundamental rights. As such the state may not draw lines which arbitrarily or irrationally exclude persons who will be directly governed by those elections where such lines are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. The disenfranchisement of seasonal workers through lengthy administrative procedures and the exclusion of workers not employed for two successive years are two examples of such arbitrary restrictions on the right to vote which independently require invalidation of this section. *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *City of Phoenix v.*

Kolodziejski, 399 U.S. 204 (1970); *Kramer v. Union School District*, 395 U.S. 621 (1969); *Hadnott v. Amos*, 394 U.S. 58 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

It is abundantly clear from examination of the district court's decision invalidating § 23-1389 of AERA that the court's holding is carefully limited to the specific, central and unique aspects of the AERA and narrowly based upon long-established First Amendment principles and decisions. The three-judge panel's decision is likewise soundly based upon specific factual findings resulting from four days of testimony. The appellants' attempt to challenge the evidentiary findings, inject a superficial analogy into the NLRA or assert tangential policy issues does not create a substantial federal question for this Court. The careful and well-founded decision in this aspect of the case raises no issue so novel and unprecedented, nor any issue so conflicting with established law as to justify plenary review by this Court and the decision of the three-judge panel should be summarily affirmed.

2. *The District Court Was Clearly Correct In Finding § 23-1385(B)(8) Invalid And Appellants Raise No Substantial Federal Question.*

There can be no question but that the primary intent of § 23-1385(B)(8) of the AERA was to allow agricultural growers and other affected parties to halt union communications, whether by picketing, handbills, oral conversations or any other means, in a labor dispute by claiming that the publicity was "dishonest, untruthful and deceptive." This Court has consistently invalidated such restrictions and regulations not as a matter of encouraging falsehoods but as a matter of who determines "truth" and by what process. The fact is that the First Amendment has always

protected more than purely "true" speech. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Vanasco v. Schwartz*, 401 F. Supp. 87 (S.D.N.Y. 1975), *aff'd* 423 U.S. 1041 (1976). If it is made a crime to tell falsehoods, as the AERA attempts, then the speaking of truth is restricted as well.

There is no merit to the growers' and the state's attempt to argue now that this provision was intended to operate only to punish past conduct and not to operate as a prior restraint on speech activity. The fact is that this provision was precisely designed to curb union communications *during* the course of a labor dispute—not after the fact—and that is exactly how it has been applied against the plaintiff union.[15] The AERA expressly provides that the Board may issue cease and desist orders against communications it finds in violation of § 1385(B)(8) [see § 23-1390(C)] and the Board or any other aggrieved party may petition the Superior Court for an injunction alleging violation of this same section [§ 23-1390(K) and § 23-1393]. The district court correctly found this section to be similar to those invalidated in *Vanasco v. Schwartz*, 401 F.Supp. 87 (S.D.N.Y. 1975) *aff'd* 423 U.S. 1041 (1976). In *Vanasco* the State of New York argued, just as the State of Arizona and the growers do now, that the state courts should be given the opportunity to engraft the *Times* malice[16] limitations onto a statute which on its face contained no such

[15] On at least two occasions retailers have relied upon the provisions of § 23-1385(B), including (B)(8) to obtain temporary restraining orders without notice against the plaintiff union. (See ¶¶ 7 and 13 of the *Stipulation Regarding Enforcement*).

[16] *New York Times Co. v. Sullivan, supra.*

limitations and made deliberate misrepresentations unlawful. On the same principles recognized in *Vanasco*, the district court here properly invalidated § 1385(B)(8) by finding:

> "The Court in *Vanasco* held that a statute prohibiting 'deliberate misrepresentations' and regulations prohibiting 'misrepresentations' in political campaigns, which on the face of the statute were not based on a finding of actual malice, was an overboard infringement of First Amendment rights and was unconstitutional on its face .
> "The statute here involved likewise contains no intent requirement and in fact is even broader since it is not limited to 'deliberate misrepresentations'.[17]

Finally, there is little to be said for the growers' and the state's suggestions that the court's invalidation of § 1385(B)(8) of the Act amounts to an implied invalidation of § 8(b)(4)(ii)(b) of the NLRA. The constitutional dimensions of the two provisions are entirely different. The proviso of § 8(b)(4) is *not* a prohibitory section of the NLRA at all, but rather a strong affirmation of conduct which is not, and constitutionally cannot be, included within the restrictive clauses. Thus the proviso *guarantees* protections of various means of union publicity.[18] Furthermore, the word "truthfully" in that context applies only to the identification of

[17] App. at A-33, 34, Jurisdictional Statement

[18] The growers and the state totally fail to recognize that the proviso in § 8(b)(4) of the NLRA was in fact inserted as a safeguard of speech rights in labor disputes. *NLRB v. Fruit and Vegetable Packers, (Tree-fruits)* 377 U.S. 58 (1964). No such proviso appears in the boycott provisions of the AERA §§ 23-1385(B)(6)-(10). The NLRA proviso is also careful to distinguish between picketing and other forms of communications, e.g. handbilling, oral conversations, publication, etc., while the AERA makes no such distinctions and broadly restricts all forms of communications.

the employer with whom the dispute exists—not to the *content* of publicity regarding the nature of that dispute.

Section 1385(B)(8) of the AERA takes an exact opposite approach. Rather than guaranteeing protection of publicity, this section broadly restricts speech. The prohibition on the use of "dishonest, untruthful and deceptive" publicity goes far beyond identification of the employer. It both invites and requires inquiry into every aspect of union publicity and the factual validity of even the smallest claims. Such a review and regulation of speech is wholly inappropriate in any area of free speech and particularly in labor relations where "uninhibited, robust and wide open" debate has been encouraged and found to be essential.

3. *The Blatant Unconstitutionality Of The Section Imposing Criminal Penalties Raises No Issues For Further Review.*

The first major issue addressed by the district court concerning the AERA is the imposition of criminal penalties on "any person . . . who violates any provision . . . " of the Act. [§ 23-1392]. The state does not directly attack the court's conclusions regarding the obvious vagueness and overbreadth of this section, and appellees submit that no such attack could be fashioned to justify further review of the lower court's decision.

In essence the imposition of criminal penalties to the entire Act transforms the unfair labor practices under the Act into a broad criminal code for farm workers and persons representing them. The breadth and vagueness of the statute are further extended by the AERA's mandate that the determination of agency shall not be controlled or limited to actual authority or subsequent ratification. § 23-1393(F).

A brief reading of the AERA's unfair labor practices

immediately reveals the unconstitutional overbreadth perceived by the lower court. Thus a farm worker who walked out on strike without a prior secret ballot election or majority approval,[19] or who engaged in recognitional picketing at the wrong time,[20] a union representative who during negotiations raised demands for union participation in the hiring, firing and transferring of workers in collective bargaining negotiations,[21] or a farm worker or supporter of the union who attempted only to persuade a market manager not to sell a struck product,[22] are all persons who could be charged, prosecuted and convicted of a misdemeanor under the AERA. Indeed, to those familiar with labor law, there are countless "crimes" created by this provision.

These examples only begin to demonstrate the twin evils of vagueness leading to "sweeping and improper application" and overbreadth leading to the criminal prosecution for the exercise of protected expressive and associational rights, and the clear necessity for the district court's ruling. *U.S. v. Sullivan*, 332 U.S. 689 (1948); *NAACP v. Button*, 371 U.S. 415 (1963); *Ashton v. Kentucky*, 384 U.S. 195 (1966).

The appellants' insistence that farm workers should pursue constitutional claims through decades of exposing themselves to criminal prosecution further ignores the central evil of a law such as the AERA which represses First Amendment rights as much by threat as by actual operation. As noted by the district court it is this threat which hangs over the heads of all those engaged in agricultural

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[19] § 23-1385(B)(13)

[20] § 23-1385(B)(12)

[21] § 23-1385(B)(11), § 23-1384(A)(2)

[22] § 23-1385(B)(7)

labor relations which is clearly constitutionally impermissible. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Doe v. Bolton*, 410 U.S. 179 (1973).

The growers and the state recognize this Damoclean effect but assert that it may only be found by choosing the interpretations of the AERA which would be unconstitutional in actual operation. Appellees submit that the district court has done no more than consider the "enormous variety of activities" covered on the face of the Act and found them too sweeping to be tolerated as criminal acts.

The appellants' claim merely blunts rather than removes the Damoclean Sword. In effect they concede that any police officer, prosecutor or judge may choose the same "sweeping and improper" interpretations, thus confirming the district court's ruling. The mere fact that it is "conceivable" that a statute such as the AERA might ultimately be narrowed to fall within constitutional limits does not justify its overbroad and vague infringement upon First Amendment rights as it presently stands. As such the three-judge panel's decision to invalidate this section was constitutionally correct.

4. *The Act's Blanket Denial Of Access To An Employer's Facilities Is Constitutionally Overbroad.*

On numerous occasions this Court has addressed the delicate balance between organizational rights and property rights in the labor context. *NLRB v. Babcock and Wilcox*, 351 U.S. 105 (1956); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *cf. Marsh v. Alabama*, 326 U.S. 501 (1946). In these cases this Court recognized that accommodations must be made between the employer's Fifth Amendment property rights and the speech interests of assuring communications between employees and union representatives.

> "[W]hen the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." *Babcock* at 112.

The availability of alternative means of communication has been identified as a major factor in determining the extent to which property rights must yield to speech rights. This factor takes on added significance in the present case since, as the district court found, many migrant agricultural employees are located upon their employer's premises not only during work hours but at most other times as well since they often reside in labor camp facilities owned by him. Thus there is added constitutional significance here. *Marsh, supra; Agricultural Labor Relations Board v. Superior Court*, 16 Cal.3d 392 *app. dismissed*, 429 U.S. 802 (1976); *Illinois Migrant Council v. Campbell Soup Co.*, 478 F.2d 73 (5th Cir. 1973).

Since the existence of adequate alternative means of communication will vary from case to case, that determination must be left for the appropriate Board or court to decide in each instance. However, as the three-judge panel pointed out the Arizona legislature has left no room in § 23-1385(C) of the AERA for such accommodation and balancing between these competing interests.[23] Through this blanket provision which relieves employers of the obligation to allow access by union representatives to their premises and labor camp facilities under *all* circumstances, the AERA imposes overbroad and intolerable restrictions on First Amendment speech activities as they must operate

[23] App. at A-37, Jurisdictional Statement.

in the agricultural labor context. Thus the three-judge panel held correctly that this provision denies First Amendment organizational and speech rights.

5. *Invalidation Of The Section Forcing Unions To Submit To Compulsory Arbitration Without Court Review Was Clearly Correct.*

The final section of the AERA specifically discussed and ruled upon by the three-judge court was § 23-1393(B) which gives a grower the unilateral opportunity to remove disputes from court jurisdiction for the final and binding determination by an arbitrator.

The particular provision addressed is a part of the section that provides court jurisdiction for enforcement of the AERA. This section, subparagraph B, in essence permits an agricultural employer to obtain from a court an automatic temporary restraining order against any strike or boycott activity,[24] and thereby remove the underlying dispute from the court's jurisdiction for referral to a court-appointed arbitrator "to decide the unresolved issues."

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[24] The provision for a ten-day temporary restraining order solely on a grower's claim that he may lose $5,000 worth of crops imposes a total ban on strike, picketing and related speech activity without regard to whether the strike is for an unlawful purpose or being conducted by unlawful means. Such a blanket prohibition on First Amendment activities is clearly unconstitutional. *Carlson v. California*, 310 U.S. 106 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Thomas v. Collins*, 323 U.S. 516 (1944). The allowance, with Rule 65 of Arizona Rules of Civil Procedure, for the issuance of such an order *ex parte* is equally unconstitutional under *Carroll v. Commissioners of Princess Anne County*, 393 U.S. 175 (1968). Thus the temporary restraining order provided for in this section is itself an independent reason for invalidating the section.

The three-judge panel examined two aspects of this provision, (1) the employer's ability to compel arbitration without the consent of the union or his employees, and (2) the lack of any judicial review of that arbitration. With respect to the first aspect, the Court held the provision unconstitutional based upon decisions of this Court which were squarely on point. *Dorchy v. Kansas*, 264 U.S. 286 (1924); *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923).

The appellants have sought to elevate this portion of the district court's holding to an attempt by that court to resurrect the historical controversy over substantive and procedural due process. In seeking to create such an issue as the basis for further review, the appellants ignore the fact that the decision makes no mention of "substantive due process", that the cases relied upon specifically involve similar statutory attempts to require compulsory arbitration without the consent of the parties, and the fact that these cases have never been overruled by this Court. Appellants further ignore that these cases have been followed on the specific issue of compulsory arbitration by various state and federal courts both before and after *Nebbia v. New York*, 291 U.S. 502 (1934), including the Arizona Supreme Court in 1944, *Henderson v. Ugalde*, 147 P.2d 490 (1944). See also *Mengel Co. v. Nashville Paper Prod. & Spec. Workers Union*, 221 F.2d 644 (6th Cir. 1955) and the annotation cited in the district court's opinion, 55 A.L.R.2d 445.

The second aspect of § 23-1393(B) reviewed by the three-judge court is the removal of the resolution of disputes by arbitration from judicial review. As noted by the court, arbitration of labor relations matters are specifically ex-

cluded from the Arizona laws providing for the enforcement and review of arbitration cases. A.R.S. § 12-1501 *et.seq.* The section of the AERA granting general jurisdiction likewise removes arbitration and requires that the arbitrator "decide the unresolved issues," without any provision for review.

As a result it is the arbitrator under § 23-1393(B), rather than a state or federal court, who is exclusively responsible for resolving factual disputes. Thus where employees strike or threaten to strike over the conduct of a federally licensed farm labor contractor, or over wage disputes which involve potential damages under the Fair Labor Standards Act, or the firing of workers which also raises claims of racial discrimination, the procedures of § 23-1393(B) could be unilaterally invoked to refer the entire matter to binding arbitration without further recourse to state or federal courts. Clearly no state can attempt to remove the resolution of such disputes from all court jurisdiction, including federal courts, without violating federal rights to a trial by jury. *Diederich v. American News Co.*, 128 F.2d 144 (10th Cir. 1942); *Re Smith*, 381 Pa. 223, 122 A.2d 625, *app. dismissed*, 350 U.S. 858 (1955); *Mengel Co., supra.*

The appellants have gone to great rhetorical lengths in their Jurisdictional Statement to expansively characterize this case as one which for the first time applies the Seventh Amendment to all state proceedings. However, the decision of the three-judge panel is not nearly so broad as appellants imagine and does not even mention or discuss the "incorporation" of the Seventh Amendment or its application to all Arizona state proceedings.

Rather, the Seventh Amendment discussion by the district court involved no more than one-half sentence in the entire opinion and applied only to this single sub-paragraph

of the Act, § 23-1393(B). Even then the Seventh Amendment is only one among several reasons given by the panel for invalidating that section. Thus even were this Court to take jurisdiction and reverse on that issue this section of the statute would still be invalid on Due Process grounds and the judgment would remain unaffected.

Thus the district court's invalidation of this subsection is clearly well founded on prior decisions in this narrow area of legislatively mandated compulsory arbitration. Appellants have not presented a proper case for plenary review of the exaggerated Seventh Amendment ramifications they have contrived.

6. *The District Court's Conclusion That The Unconstitutional Provisions Were Inseparable From The Rest Of The Act Is Correct And In Accord With Supreme Court Precedents.*

The district court properly determined that one or more of the sections of the Act found to be unconstitutional were inseparable from the remainder of the Act, rendering the entire AERA unenforceable. In so ruling, the lower court correctly applied guidelines established by this Court relating to severability from a statutory scheme which relied principally on the stricken provisions to effectuate its underlying policies.

The rules applied by this Court in passing on questions of severability are well established. *Dorchy v. Kansas*, 264 U.S. 286 (1923); *Lynch v. United States*, 292 U.S. 572 (1934); *Carter v. Carter Coal Co.*, 298 U.S. 238, 312, 313 (1936); *Meek v. Pittinger*, 421 U.S. 349 (1975).

> "Provisions within the legislative power may stand if separable from the bad. But a provision inherently unobjectionable cannot be deemed separable unless it appears both that, standing alone, legal effect can be

given to it, and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." *Dorchy* at 290.

In *Carter, supra,* the Court noted that the absence of a statutory provision for severability creates a presumption against severability. Since the AERA contains no severability clause, the presumption is that the remaining provisions fall with the invalidated ones.[25] Clearly the state and the growers cannot rebut that presumption here.

In the opening passages of the Act, the Legislature declared it to be state policy "that agricultural employees shall be free to organize, to take concerted action, and through representatives of their own choosing enter into collective bargaining contracts," in furtherance whereof, "[i]t is the intent of the legislature to provide a means to bargain collectively which is fair and equitable to agricultural employers, labor organizations and employees; to provide orderly election procedures to resolve questions concerning representation of agricultural employees and to declare that certain acts are unfair labor practices which are prohibited and subject to control by the police power of this state." 23 A.R.S. § 1381. From this it is clear that the election procedures established in § 1389 of the Act are crucial to the operability of the entire AERA. Moreover, the rights of agricultural employees to self-organization

[25] Even the inclusion of such a clause, while reversing the presumption, would not conclusively save a statute. Where the standards announced in *Dorchy, supra,* have not been met, the Court has disregarded such severability clauses, noting that they serve "as [aids] merely; not as . . . inexorable command[s]." *Dorchy, supra,* 264 U.S. at 290. Indeed, the statutes reviewed in *Dorchy, Carter* and *Meek, supra,* all contained severability clauses.

and to bargain collectively, enunciated in § 1383 of the Act, may, according to the terms of the Act, be exercised effectively *only* through the election mechanisms prescribed in § 1389. As the district court correctly noted:

> "If this section [1389] fails, the rest of the Act must fail, since most of the use of the Act would apply only if farm workers were initially free to organize and not if the exercise of such a constitutional freedom of assembly were made impossible." (App. at A-25, Jurisdictional Statement).

The election procedures, boycott provisions and no-strike mandates struck down by the district court stand at the heart of the AERA. As indicated in the Act's Declaration of Purpose (§ 23-1381), and argued by the appellants themselves before the district court, the AERA was enacted purportedly to balance the rights of agricultural employers and employees, i.e., to assure that crop production would not be obstructed and at the same time to enable workers to organize. The deletion of the anti-strike and anti-boycott provisions, which gave protection to the employers or the recognition election provisions, which purported to confer minimal rights on employees would serve to favor one side or the other and upset the balance envisioned by the legislature should the remainder of the Act continue in effect.

Quoting this Court's observation in *Carter, supra,* the provisions of the AERA "are not like a collection of bricks, some of which may be taken away without disturbing the others, but rather are like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole." 298 U.S. at 315, 316. If the legislative balance devised in the AERA is constitutionally flawed, as the district court has

held, the Act must be nullified in all its provisions and returned to the legislature to strike a new balance.[25a]

7. *The Three-Judge Court Ruled Properly That The Record Of Enforcement Of The AERA Against The Appellees Established An Article III Controversy.*

A. *The record of enforcement of the AERA, both actual and threatened, reveals a real and justiciable controversy.*

The defendant state and intervening growers on several occasions raised before the district court their contention that the plaintiffs' challenge to the AERA was "hypothetical". The three-judge panel carefully considered this issue, asked that a record be made regarding it, and then after lengthy briefing properly decided that there was in fact the requisite Article III controversy. A review of the record quickly demonstrates the reality and extent of that controversy.

Contrary to the suggestions of the growers and state in their Jurisdictional Statement, at the time the Amended Complaint was filed, the Agricultural Employment Relations Board (Board) created by the Act had been appointed and was fully funded and staffed. Also, as alleged in the Amended Complaint, that Board had already initiated unfair labor practice charges against the plaintiff union to

[25a] The cases cited by the appellants in urging severance of the invalidated clauses are entirely disimilar. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that the invalidation of portions of one statute enacted in 1972 were clearly separable from a related but different statute passed in 1966 and revised in 1971. Similarly in *United States v. Jackson*, 390 U.S. 570 (1968), the validity of the Federal Kidnaping Act was sustained despite the unconstitutionality of a penalty provision where the invalidated clause had been added three years after the statute's original enactment. In *Champlin Refining Co. v. Corporations Commission*, 286 U.S. 210 (1932), the Court relied heavily on the inclusion of a severability clause in the statute.

enjoin its boycott activities under § 23-1385(B) of the AERA, including § 1385(B)(8) which has now been expressly ruled unconstitutional by the district court.[26]

By the time of trial the *Stipulation Regarding Enforcement*, entered into as part of the pretrial order, revealed that no less than seven superior court actions had been initiated against the plaintiff and various of its members and supporters alleging violations of the AERA.[27] The appellant Board was plaintiff in one of these.[28] The result of several of these suits was the enjoining of protected speech activities, including handbilling and oral conversations by union members and supporters in furtherance of their consumer boycotts.[29] In three of these actions, First Amendment speech activity was enjoined by temporary restraining orders without notice or hearing under provisions of the AERA in direct conflict with the guidelines set down by this Court in *Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175 (1968).[30]

In addition to these civil suits the Board itself had also filed complaints and conducted administrative hearings against the appellee union and its members which violated

[26] *Stipulation Regarding Enforcement* ¶2F

[27] *Id.* ¶ 1, 2, 3, 7, 12, 13 and 20

[28] *Id.* ¶12

[29] The growers and the state are in error when they claim that no sections of the AERA discussed by the court have been used against the appellees. In at least 4 of the actions enforcing the Act against appellees the parties bringing the actions relied upon this provision (see *Stipulation* ¶ 2, 3, 7 and 13). The growers and the state are also incorrect in their contention that the election procedures have never involved any delay. The only contested election even scheduled was set for 1 week after the harvest and after the majority of workers had left. See discussion above, § 1A.

[30] *Stipulation Regarding Enforcement* ¶ 7, 12 and 13.

their First Amendment rights. In one charge the Board had placed a total ban on much of the union's boycott activity at several stores regardless of how peaceful the conduct or by what means messages were communicated.[31] At no time in over five years did the Board or its General Counsel indicate that they would enforce the AERA against the appellees to any degress less than a full application of its sweeping terms. And that is precisely how it has been enforced.

In addition to the growers and the state being in error in suggesting that those specific provisions addressed by the court have not been used against the appellees (n.29, *supra*), appellees submit that the appellants are misled in their attempt to restrict their Article III discussion to only those provisions. The Amended Complaint challenged the validity of the *entire* AERA and the district court ultimately found invalid the *entire* Act. Therefore it is the enforcement of the whole Act and not just those provisions discussed in the district court's opinion which must be considered when discussing the Article III implications.

Another very significant factor that must be considered for Article III consideration is that the AERA existed as a *criminal statute* as well as an administrative one. § 23-1392 of the Act made violation "of any provision of this article . . . a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than a year, or both."

This Court on numerous occasions has held in facial attacks upon overbroad criminal statutes that the parties affected need not await actual prosecution before an Article III case or controversy exists. *Doe v. Bolton, supra; Steffel v. Thompson*, 415 U.S. 452 (1974); *Carey v. Population*

[31] *Id.* ¶ 11.

Services, Int'l., 431 U.S. 678 (1977). In light of the record enforcement of the AERA there can be no question but that the plaintiff union and its members were the parties "against whom [this] statute directly operate[d]" and that they "asserted a sufficiently direct threat of personal detriment".[32] It is also clear that the actual enforcement of the AERA against plaintiffs was much greater than that experienced by the plaintiffs in *Steffel, Bolton*, and the numerous other cases cited by the district court.[33] Nor in over five years did the state through its attorney general or any other agent ever indicate it did not intend to enforce the Act criminally.

The record also established beyond question that the plaintiffs suffered concrete and definite harm from application of the AERA. The unrebutted testimony was that because of the AERA plaintiff farm workers in Arizona had been deprived of improvements in wages and working conditions that workers in other states had acquired (Tr. 206). In addition the plaintiff union lost many members as well as several collective bargaining agreements it had prior to the Act. Testimony indicated that this resulted because employers, once shielded by the AERA, were less willing to negotiate with the appellee union. Finally the record showed that some UFW supporters had been unwilling to continue their participation in boycott activities because they were threatened with arrest or contempt citations under the Act (Tr. 202-208).

Surely the sum of these circumstances meet the frequently-cited standard laid down in *Maryland Casuality Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273 (1941):

[32] *Doe v. Bolton*, 410 U.S. at 188.

[33] See App. at A-11, Jurisdictional Statement.

> "Basically the question in each case is whether the facts alleged under all the circumstances show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 512.

B. *Plaintiffs have further demonstrated a case or controversy under the standard applied when statutes are challenged for facial overbreadth.*

The facts in Section 7A above amply show that a case or controversy exists in this case under the traditional test. However, a second standard is also applicable. The appellees' challenge to the AERA was primarily a challenge to the Act as constitutionally overbroad on its face. They alleged that some eleven provisions of the Act encompassed within their prohibitions conduct absolutely protected by the First Amendment, and the district court agreed with respect to those provisions it found necessary to discuss. In First Amendment cases of this nature this Court has frequently departed from the traditional jurisdictional rules and has applied a more liberal standard for finding a case or controversy because of the "danger of tolerating in the area of First Amendment freedoms the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. at 433.

In this way claims of facial overbreadth have been upheld against statutes regulating speech. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Epperson v. Arkansas*, 393 U.S. 97 (1968); where rights of association were threatened, *Keyishian v. Board of Regents*, 355 U.S. 589 (1967), *Shelton v. Tucker*, 364 U.S. 479 (1960), and where laws purported to regulate the time, place and manner of expressive conduct, *Zwickler v. Koota*, 389 U.S. 241 (1967); *Thornhill v. Alabama*, *supra*.

In many of the overbreadth cases there had been no enforcement of the statute at all against the plaintiffs. However, rather than await a case-by-case excision of a statute's overbreadth or vagueness through review of its application to particular conduct, under the rubric of the overbreadth doctrine such laws have been invalidated facially so as to end their deterrence of constitutionally protected activity.

The growers and the state miss the mark when they suggest that the decision in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) supports their claim that no controversy exists. First of all this Court in *Broadrick* by no means restricted the overbreadth doctrine so narrowly as appellants now argue. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Bigelow v. Virginia*, 421 U.S. 809, 815 (1975).

Secondly, even the *Broadrick* test is met in the present circumstances. The overbreadth in the AERA is most certainly both *real* and *substantial*. The protected activities which plaintiffs allege are encompassed within the proscriptions of the Act—e.g., the right to picket and strike, the right to speak freely in collective bargaining, the right of access to workers—are the very activities which the plaintiffs absolutely must be permitted to undertake in order to accomplish the objectives for which their association was formed. They are also the very activities which the AERA has been applied to enjoin. Thus plaintiffs do not point speculatively to fringe conduct which someday may be wrongfully enjoined, but rather to that conduct essential to the meaningful organization of farm workers and already frustrated by the AERA.[34]

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[34] The appellants also are in error when they attempt to distinguish this case from other overbreadth cases arguing that it is a comprehensive regulatory statute and citing *Alabama State Federation of Labor v.*

Finally, it is significant that the appellee United Farm Workers brings this action on behalf of itself *and its members*, i.e., agricultural workers who are included within the Act's coverage. As such the plaintiff union has standing to assert not only its own interests but those of its membership as well. *NAACP v. Alabama*, 357 U.S. 449 (1958); *United Mine Workers v. Illinois Bar Assoc.*, 389 U.S. 217 (1967).

Furthermore in such circumstances the union is in a posture to assert the rights of other farm workers who are the very persons the UFW wishes to organize but who are restricted in such efforts by the AERA. In this vein the appellee UFW certainly has demonstrated at least that degree of interest necessary to establish a case or controversy recognized by this Court in *Craig v. Boren*, 431 U.S. 678 (1977) and *Carey v. Population Services Int'l.*, 431 U.S. 678 (1977).

Thus whether one applies (1) the traditional case or controversy test, (2) the standard applicable when a statute is challenged for First Amendment overbreadth, or (3) the doctrine permitting an organizational plaintiff to represent the rights of its aggrieved members or other third parties,

McAdory, 325 U.S. 450 (1944) and *A.F.L. v. Watson*, 327 U.S. 582 (1946). However the growers and state can take no solace in the fact that the AERA contains not just one but several provisions restricting First Amendment freedoms and the authority they cite certainly does not support such a position. In fact, as this Court noted, the Complaint in *McAdory* did *not* allege any direct restrictions on First Amendment activities, 325 U.S. at 457 but merely alleged possible indirect effects as a licensing statue. Thus, this Court did not even undertake in *McAdory* a discussion of the overbreadth considerations. In *Watson* the U.S. Constitutional issues hinged on whether an amendment to the Florida constitution was self-executing or not. There is no similar question here.

the appellees in each case satisfy the controversy requirements of Article III.

8. *The Three-Judge Panel Ruled Correctly That The Doctrine Of Abstention Is Inappropriate In The Instant Case.*

The appellants argue further that the district court should have abstained in this matter. To support this contention they point to five provisions where they feel the lower court should have stepped aside to permit a "narrowing" state court interpretation. This argument of course concedes an Article III case or controversy since the doctrine of abstention involves not a matter of jurisdiction but rather an exercise of the court's discretion. *Baggett v. Bullitt*, 377 U.S. 360, 375. The district court exercised that discretion properly when it decided not to abstain in this case.

At least since *McNeese v. Board of Education*, 373 U.S. 668 (1963), it has been established that in a 42 U.S.C. § 1983 action the plaintiffs need not exhaust their state judicial remedies before availing themselves of their federal forum. In fact subsequent to *McNeese*, it has been overwhelmingly established that civil rights cases are the least appropriate instances for the federal courts to abstain to await state court adjudications. *Zwickler v. Koota*, 389 U.S. 241, 241-252 (1967).

> "After examining the purposes of the Civil Rights Act . . . [w]e would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court . . . . These principles have particular significance when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment. In such case to force the plaintiff who has commenced a federal action to suffer the delay of state court pro-

ceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." 389 U.S. at 251-252.

Since the doctrine of abstention has the effect of frustrating a federal litigant in his choice of an otherwise appropriately invoked federal forum, it has been applied only in narrowly limited special circumstances, *Zwickler, supra; Baggett v. Bullitt, supra.* In those narrow instances where federal courts have abstained—almost always in areas other than civil rights litigation—they have done so only in those special and extraordinary circumstances where the issue of state law was uncertain *and* where there was a *substantial* and *immediate* possibility that a single or otherwise prompt state court interpretation of the state law question would obviate the necessitate of deciding the federal constitutional issue. See *Steffel v. Thompson, supra; Harman v. Forssenius,* 380 U.S. 528, 534 (1965); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971).

The present case does not pose such a situation where the state statute is "obviously susceptible of a limiting construction,"[35] and where there is a substantial possibility of a relatively swift state court interpretation that could eliminate the federal question.

The provisions of the AERA challenged in the Amended Complaint are express and clear. Their defects under the First and Fourteenth Amendments are blatant. For example the growers and the state do not dispute the appellees' claim that the Act limits the right to strike only to a majority of employees [§ 23-1385(B)(13)] and calls for an automatic ten day temporary restraining order during harvest

[35] *Zwickler, supra,* 389 U.S. 241, n. 14.

time strikes [§ 23-1393(B)]. The meaning of these sections is certain; the only question is whether they run afoul of the Constitution.[36]

In similar fashion the parties have had no true differences in determining the clear meaning of the AERA's boycott provisions. The Board has stipulated that both it and its general counsel both read and have applied § 23-1385(B)(6) and (7) as prohibiting certain handbilling and oral conversations which the plaintiffs contend are pure speech and constitutionally protected.[37] Again the only difference to be resolved between these parties on this issue is one of constitutional law.

The growers and the state are plainly in error in suggesting that the examples they propose in their Jurisdictional Statement would justify abstention. First of all, they are points not critical to the district court's decision. In most examples raised by the appellants the district court invalidated the statute on issues *other* than those referred to in their abstention discussion; they do *not* propose possible interpretations to critical terms upon which the validity of a provision may stand or fall. Secondly, the sections they refer to are quite clear and do not lend themselves to the alternative interpretations the appellants suggest.

For example, regarding the clarity of the provisions, it has been only the appellants who have had any questions about the unavailability of bargaining orders under the AERA. There can be no doubt—and the district court had

[36] *A.F.L. v. Swing,* 312 U.S. 321 (1941), *Carroll v. President and Commissioners of Princess Anne County,* 393 U.S. 175 (1968); *Baldwin v. Arizona Flame Restaurant,* 82 Ariz. 385, 313 P.2d 759 (1959).

[37] See *Stipulation Regarding Enforcement* ¶¶ 11 and 12.

no difficulty determining—that the Act expressly prevents the Board from ordering an employer to bargain with a union unless that union has won a representation election.[38]

Appellants next argue that the Act's use of the term *calendar year* may mean something other than the meaning universally given the term, i.e., January 1 through December 31. Without referring to any Arizona authority they suggest it might mean merely the preceding 365 days measured from some indeterminate date. However, such an interpretation would require striking words "preceding" and "calendar" and give the phrase absolutely no significance whatsoever in the context in which it was used.[39]

Likewise, the application of Arizona's Administrative Procedures Act hardly calls for abstention. First of all, their proposed alternative "interpretation" is highly attenuated at best. Secondly, there was ample evidence in the record that the same delay in the election process would exist even should the APA standard not be applicable.[40]

Next the appellants suggest that the lower court should have abstained to determine if the Arizona courts would someday incorporate the *Times* malice limitation upon a provision of the statute which on its face obviously had no such limitation. The law is clear however that in the area of First Amendment overbreadth federal courts need not—indeed should not—defer to the mere possibility of such state court action. *Zwickler, supra; Vanasco v. Schwartz, supra.*[41]

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[38] See Note 14, above.

[39] See discussion in Section 1C, Elections, above.

[40] The 20 day period required by the APA for notice of a pre-election hearing is a relatively minor point in light of testimony by experts from both sides that under NLRB experience, 14-21 days were required to administrate nearly identical procedures.

[41] See discussion in § 2, *supra.*

Finally the appellants' discussion of the impact of the term "facilities" in § 1385(C) ignores the record in this case. As the district court pointed out, in the context of agricultural labor adequate communication with migrant employees means not only access to field where they may work but also to labor camp residences, frequently the only place these workers may be contacted outside working hours. These camps are almost always owned by the agricultural employer and located somewhere upon his ranch. The terms of § 1385(C) clearly allow the employer to deny union representatives access to such facilities under all circumstances. Therefore the district court was correct in finding the provision overbroad on its face.[42]

The appellants have failed to demonstrate that this is a situation where the statute is so uncertain that the federal court should await a state court interpretation. The provisions are *not* fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question. *Harman v. Forssenius, supra.* Furthermore this Court in those cases where it has rejected abstention has noted that the doctrine operates to require piecemeal adjudication thereby delaying ultimate adjudication on the merits for an undue time. It has further indicated that the consequences of this are costly when the overbreadth of the statute inhibits the exercise of constitutionally protected conduct. *Baggitt, supra,* at 379; *Keyishian v. Board of Regent,* 385 U.S. 589.

There is no substantial possibility that a single proceeding will arise in state court in which the state courts could act swiftly to redress the AERA's numerous intrusions upon constitutionally protected conduct. The appellees should not be forced to forego their First Amendment

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[42] See discussion in § 4, *supra.*

rights and to face decades of litigation to reconfirm the unconstitutionality of the AERA that is presently clear on its face and already so determined in the district court's opinion.

CONCLUSION

The three-judge panel acted properly in finding that the major provisions of the AERA totally vitiated fundamental freedoms of agricultural employees and labor organizations representing them. In its detailed Findings of Fact and Conclusions the court amply demonstrated that those provisions in fact operated to exclude most farm workers from participating in that election process established as the sole avenue to union recognition. In addition the Act directly deprived these same parties of the use of most of the means of communication that have been recognized as essential to organizing and association through labor organizations.

The widespread application of the AERA, the fact that its overbroad provisions were enforceable through criminal penalties, and the adverse effects of the Act upon the appellees appearing in the record convinced the court that the case or controversy requirement of Article III had been satisfied.

Contrary to the growers' and state's suggestion, the district court has not prohibited proper experimentation by a state legislature. Rather, appellees submit that the court's opinion will foster rather than inhibit such experimentation by providing some of the first concrete judicial guidelines for dealing with these competing interests. The court has only reaffirmed the long-established principle that there are constitutionally imposed limits upon the avenues available to law-makers when drafting regulatory statutes. The

three-judge panel has reminded us that those limits are breached when the regulations suppress the exercise of fundamental freedoms of expression and association. Subject to this basic limitation, however, the Arizona and other state legislatures still remain free to experiment with a wide variety of union recognition and election procedures in the unique field of agriculture.

Therefore appellees respectfully submit that the questions raised in the Jurisdictional Statement are insubstantial. The decision below is so plainly correct as not to warrant further review and should be summarily affirmed by this Court.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1978

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BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
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Intervenor Appellants,

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ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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Pursuant to Rule 12, the Appellants have requested the Clerk of the District Court to certify certain parts of the record in the belief that it may be helpful in reconciling the discrepancies between statements contained in the Jurisdictional Statement and the Motion to Affirm.

The Jurisdictional Statement declares:

> Of the five statutory provisions found constitutionally defective by the lower court (discussed below) the only one involved in any of the enforcement proceedings was § 1389, which deals with elections. Not one of these plaintiffs was involved in any way in any of those elections or any other election under the statute that they challenge. In none of the six election cases covered by the stipulation was there any allegation of unfairness because of delays. Jurisdictional Statement at 9.

The foregoing statement was drafted with care and with sensitivity to its impact on the justiciability issue. It is an absolutely correct statement, as the Court can verify by examination of the Enforcement Stipulation.

There is nothing in the Enforcement Stipulation indicating any enforcement or interpretation of Section 1385 C dealing with access to employer facilities. There is nothing in the Enforcement Stipulation indicating any interpretation of Section 1392 providing for criminal penalties. There is nothing in the Enforcement Stipulation indicating any interpretation or enforcement of Section 1393 B dealing with ten day injunctions. Examination of the Enforcement Stipulation also reveals that Section 1389 dealing with elections has never been applied to any plaintiff in this lawsuit, and the Enforcement Stipulation is devoid of any indication of any election problems resulting from delay.

With regard to the final section held unconstitutional by the lower court, a single unfair labor practice covered by Section 1385 B 8, the statement in footnote 19 of the Jurisdictional Statement is absolutely correct. That unfair labor practice provision has never been interpreted nor enforced. The statement in footnote 29 of the Motion to Affirm that "in at least 4 of the actions enforcing the Act against Appellees the parties bringing the actions relied upon this provision" is misleading and its misleading feature is flatly false. The reference to "this provision" is obviously intended to be a reference to subpart 8 of Section 1385 B. But the four actions to which the Appellees refer in their footnote 29 are actions under Section 1385 B. In only one case was a violation of subsection 8 even alleged (as discussed in our footnote 19) and in none was it either interpreted or enforced.

Therefore, the representations and implications to the contrary notwithstanding, the correct statement with reference to interpretation or enforcement of the provisions of the five statutory provisions held unconstitutional by the District Court is that not one of them has ever been interpreted or enforced in any proceedings involving any of these Plaintiffs. Of the five, only Section 1389 has ever been interpreted or enforced, as to anyone, and in none of the election proceedings covered by the Enforcement Stipulation was there ever an allegation of problems pertaining to delay.

With regard to the other six questions presented, the Motion to Affirm establishes clear disagreement with our position on the merits of these ques-

tions.[1] However, the arguments in the Motion to Affirm also clearly reveal that all of these issues are substantial. In the last analysis, the Appellees are left solely with the proposition that the District Court should be affirmed in all respects. Given the incontrovertible fact that the issues are substantial, we respectfully submit that they either be reviewed on the merits or be considered sufficient for summary reversal on grounds of justiciability.

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[1] The only new matter presented in the Motion to Affirm was the assertion that there is a legal presumption against severability of unconstitutional sections of the state statute. Motion to Affirm at 30. If there is any presumption under Arizona law it is to save a statute or as much of it as can be severed and saved. *State v. Snyder*, 25 Ariz. App. 406, 544 P.2d 230 (1976), (citing the decisions of this Court set forth in footnote 64 of our Jurisdictional Statement). Whether unconstitutional sections of a state statute are presumed severable or not, as this Court has noted, "the determination, in the end, is reached by applying the same test - namely, What was the intent of the lawmakers?" *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936). As developed more fully in the Jurisdictional Statement at page 47, the intent here is disclosed by what the Legislature did in passing this statute. The legislative determinations concerning, for example, the need for an Agricultural Labor Board, the propriety of prohibiting a union from engaging in arson for the purpose of preventing the sale of agricultural products, and the prohibition against an employer making financial contributions to a union and discriminating in regard to hiring and tenure in order to discourage union membership are completely separate from policy decisions concerning election procedures, access to employer facilities, untruthful consumer publicity and arbitration of labor disputes.

The Agricultural Employment Relations Act represents a careful effort by the Legislature of the State of Arizona to deal with one of the most important problems facing that state. The issues are too important to permit the judgment of a single Court to be both the first and last word concerning the constitutionality of that effort.

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OPINION BELOW

The opinion of the district court (A. 457-501) is reported at 449 F. Supp. 449.

JURISDICTION

The judgment and order of the three-judge district court, holding unconstitutional in its entirety and enjoining enforcement of the Arizona Agricultural Employment Relations Act (AERA) Arizona Revised Statutes Sections 23-1381 through 23-1395 (Supp. 1978), (A. 502-539) was entered on April 20, 1978. The notice of appeal was filed on June 13, 1978, and the Jurisdictional Statement was filed on August 8, 1978. The Court's order postponing further consideration of the jurisdiction question to the hearing of the case on the merits was entered on October 10, 1978.

Jurisdiction to consider the correctness of the lower court's judgment is conferred on this Court by 28 U.S.C. Section 1253 (1970). There is a jurisdictional issue. If, as appellants contend, there is no case or controversy, then under Article III of the Constitution, neither the district court nor this Court has jurisdiction to decide the substantive issues.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Seventh Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution provide in pertinent part:

> *First Amendment:* "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble ...."
>
> *Seventh Amendment:* "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
>
> *Fourteenth Amendment:* "[N]or shall any State deprive any person of life, liberty, or property, without due process of law ...."

The full text of Arizona's Agricultural Employment Relations Act is set forth at in the Appendix at page xxxx.

QUESTIONS PRESENTED

1. Whether an Article III case or controversy is presented by a lawsuit challenging in its entirety a comprehensive agricultural labor regulatory statute, where the lawsuit was filed prior to the appointment of the Agricultural Employment Relations Board and prior to adoption of any regulations; where not one of the five statutory provisions held constitutionally defective has ever been applied to any of the plaintiffs; and where the record consists almost entirely of widely differing speculation concerning how the statute might be applied.

2. Most of the district court's constitutional rulings depend upon its interpretations of the state statute that it invalidated. In each instance, the court chose the interpretation that raised, rather than avoided, the constitutional questions. The second question presented is whether under these circumstances the district court had an obligation either to abstain or to adopt that version of state law that would save the statute rather than invalidate it.

3. Whether the election procedures provided by Arizona's Agricultural Employment Relations Act can be held to violate the right of freedom of assembly, on the basis of assumed but unproven delays in holding elections, where the challenged procedures are virtually identical to those of the National Labor Relations Act (NLRA), and where the asserted reason for the significance of delay — peak employment seasons of short duration — is equally applicable to an important segment of NLRA coverage.

4. Whether a state labor statute's extension of the proviso in section 8(b)(4)(ii)(B) of the NLRA, which permits truthful secondary consumer pressures, to a prohibition against untruthful, dishonest and deceptive secondary consumer pressures renders it unconstitutional.

5. Whether under this Court's holdings in *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956), *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), and others, federal courts are to determine issues of union access to employers' property by taking into account all relevant considerations, including the availability of other means of communication, or whether the issue may be decided without regard to the facts of the particular case.

6. Whether for the first time in history the Seventh Amendment should be held binding on the states, and if so, whether compulsory arbitration in the narrow circumstances of section 1393 B of the Arizona Agricultural Employment Relations Act violates the Seventh Amendment or substantive due process.

7. Whether the district court's determination that all or parts of four out of fifteen sections of Arizona's Agricultural Employment Relations Act (and one out of twenty unfair labor practices) were unconstitutional, justified its invalidation of the entire Act, when most of the remaining provisions are functionally separate and independent.

STATEMENT OF THE CASE

The National Labor Relations Act excludes agricultural laborers from its coverage.[1] During its 1971 session, the Arizona Legislature first attempted to deal with the serious problems resulting from the absence of a labor law protecting an important segment of the State's work force. Because there was no governmentally controlled and supervised procedure for workers to choose their bargaining representative, representation questions were settled as a matter of economic might, rather than free choice. The Legislature was unable to reach a consensus in 1971.

In May of 1972, following extensive hearings and debates in which the views of all interested parties were considered, the Legislature enacted the Agricultural Employment Relations Act (AERA). It is a comprehensive labor statute, modeled after the NLRA in its overall structure and operation, but tailored in many respects to the peculiar conditions of agricultural labor. The Act defines persons and activities subject to its coverage,[2] specifies and prohibits un-

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[1] Section 2(3), 29 U.S.C. § 152(3) (1970).

[2] Ariz. Rev. Stat. § 23-1382 (Supp. 1978) (A. 505).

fair labor practices by employers[3] and unions,[4] and defines the obligation of each to engage in collective bargaining.[5] It provides procedures for secret ballot elections virtually identical to those of the NLRA.[6] It also establishes an agricultural employment relations board (Board),[7] and gives it power to hold hearings,[8] conduct elections and certify the results,[9] issue cease and desist orders,[10] order reinstatement and back pay,[11] supervise elections,[12] prohibit unfair labor practices,[13] and generally to implement the statute.

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[3] *Id.* at § 12-1385 A (A. 510).
[4] *Id.* at § 23-1385 B (A. 511).
[5] *Id.* at § 23-1385 D and E (A. 516).
[6] *Id.* at § 23-1389 (A. 522).
[7] *Id.* at § 23-1386 (A. 518).
[8] *Id.* at § 23-1387 C and § 23-1390 (A. 521, 526).
[9] *Id.*
[10] *Id.* at § 23-1390 C (A. 527).
[11] *Id.*
[12] *Id.* at § 23-1389 (A. 522).
[13] *Id.* at § 23-1390 (A. 526).

The complaint in this case,[14] challenging the statute on numerous constitutional grounds, was filed about three months after the statute had been signed into law. At that time, there were no regulations, the Board had not been appointed, and there had been no enforcement of the law. Subsequently, the Board was appointed, regulations were adopted, and there has been some enforcement of the Act. Approximately one year after the complaint was filed, it was replaced by an amended complaint.

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[14] The lower court's opinion describes the parties:

> Plaintiffs in this action are the United Farm Workers National Union (U.F.W.), on behalf of itself and its members; Gustavo Gutierrez, an agent of the U.F.W. in the State of Arizona; Ruben Alaniz and Matilda Varela, farm workers, on behalf of themselves and all other farm workers; and Wendy Rose, an individual supporter of the U.F.W., on behalf of herself and all other similarly situated U.F.W. supporters.
>
> Defendants are Bruce Babbitt, Governor of the State of Arizona; Jack La Sotta, [sic] Acting Attorney General; Bert [sic] Fleming, Treasurer; Raymond Long, Finance Commissioner; Gene Blake, William S. Boice, Jack Montgomery, Keith Walton, Jack McManus, Milton G. Sanders, individually and as members of the Arizona Agricultural Relations Board; and Theresa Bond, in her capacity as Executive Secretary of the Board. (A. 458)

In addition, the Arizona Farm Bureau Federation, an Arizona corporation, the Arizona Grape Growers' Association, an Arizona corporation, the Vegetable Growers' Association, an Arizona corporation, and the Yuma Citrus Shippers' Association, an unincorporated association, were permitted to intervene as defendants. *Id.*

The district court did not determine this case to be a class action.

Just prior to the trial of this case, in January of 1977, the parties entered into a Stipulated Statement of Status of Past and Pending Actions Taken in Accordance with the Agricultural Employment Relations Act (Enforcement Stipulation) (A. 79) describing the twenty instances in which there had been some kind of enforcement of the Act.

None of those twenty is involved in this litigation. Moreover, as described more fully below, none involved application to any of these plaintiffs of any of the five statutory provisions held unconstitutional by the district court.

Three of the five invalidated sections—section 1385 C (dealing with availability of the employer's materials, information, time or facilities to facilitate union communication with employees), section 1392 (providing criminal penalties for violation of the act) and section 1393 B (dealing with binding arbitration)—were not involved in any way in any of the twenty cases. The fourth provision, section 1385 B 8, prohibiting secondary consumer pressures "by the use of dishonest, untruthful and deceptive publicity" was involved in the pleadings in only one case, designated as case no. 2. In that case, the state court neither interpreted nor enforced that unfair labor practice because of its conclusion "that the Union's publicity is a sufficient compliance with subsection 8."[15] The appellees have implied that other cases, specifically, cases 7 and 13 of the Enforcement Stipulation also involved application of this provision which makes the use of dishonest, untruthful and deceptive publicity an

[15] Enforcement Stipulation, Exhibit 2A (A. 102).

unfair labor practice. (See Motion to Affirm 20 n.15; Motion to Affirm 33 n.29.). The record does not sustain this implication. Other parts of section 23-1385 B — which covers all union unfair labor practices — were involved in those cases, but subsection 8 was not. The only unfair labor practice provision held unconstitutional by the district court was subsection 1385 B 8, and this particular provision has never been interpreted or applied either to the appellees or anyone else.

The Enforcement Stipulation shows there has been some experience with the fifth provision held unconstitutional by the district court, section 1389, dealing with election procedures. Importantly, however, none of the elections has involved any of the plaintiffs in this case, and in none was there any suggestion of problems resulting from time delays.[16]

The trial was held before a three-judge district court. Most of the evidence presented at the trial consisted of the expression of views speculating as to the results that might be expected under certain provi-

[16] The motion to Affirm attempts to dispute this fact without really disputing it. The Motion to Affirm asserts: "The only contested election even scheduled was set for one week after the harvest and after the majority of the workers had left." Motion to Affirm 33 n.29. In making this assertion, appellees imply that the union involved, the Teamsters, withdrew its election petition for that reason. There is no support in the record for this implication. In any event, the implication is irrelevant, because the record is devoid of any suggestion that in any election held under the Act, time delays have resulted in unfairness. *See* Enforcement Stipulation case no. 5 (A. 83) and Stipulation Regarding Harvest and Pre-Harvest Seasons, Data from Cactus Distributors (A. 229).

sions of the Act if and when they were actually applied.[17] This testimony necessarily rested on two assumptions:

1. The interpretation that the Arizona courts would place on several key provisions whose meaning was, and still is, in dispute.[18]

2. The effect of those provisions — once interpreted by the Arizona courts and applied by the Board — on agricultural employment conditions and relationships in Arizona.[19]

It is not surprising that the "expert opinions" built on such a combination of speculations varied greatly. Regarding the question considered most important by the district court — the minimum time that would expire between the filing of the election petition and the holding of an election — the defendant's "expert," a retired NLRB official, concluded that the period

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[17] The witnesses were Mr. Cesar Chavez, President of the plaintiff United Farm Workers Union, two labor lawyers, one offered by each side, an agricultural field supervisor, and an agricultural economist.

[18] Concerning access to the employer's property, for example, one of the issues on this appeal, Mr. Chavez acknowledged that "whether it [access] is denied or not is a matter of legal interpretation." (A. 406). Mr. Chavez repeatedly stated that adverse effects from the statute were based on assumptions concerning how it would be interpreted. See, *e.g.*, A. 370-72, 384-86, 401.

[19] Some of Mr. Chavez' views were based on interpretations of the law given by his attorneys. See, *e.g.*, A. 407. Referring to a particular provision dealing with management rights Mr. Chavez stated: "I don't know what it means but if it means what I think it to mean, then it would have a very bad effect on the Union." A. 384.

could, if necessary, be shortened to as few as eight days. "Experts" for the plaintiffs concluded that it would be much longer.

The expert opinions were not based on actual experiences with elections that had in fact been held. All involved attempts to construct hypothetical models concerning how much time might be required to conduct elections under the Act, given certain factual assumptions, and given the experts' differing views concerning the meaning of the statute.

The plaintiffs attempted to blunt the obvious case or controversy problems resulting from their attempt to have a federal court pass on the constitutionality of statutory provisions in the absence of actual application of any of these provisions in the action before the court, by pointing to the Enforcement Stipulation (A. 79). The twenty cases covered by that stipulation fall into three categories:

1. Eight of the cases, numbers 1, 2, 3, 7, 11, 12, 13, and 20 were attempts to prevent allegedly illegal secondary boycotts. In each of these cases the defendant, or the party charged, was the appellee U.F.W., and in each, the plaintiff or the charging party relied on some portion or portions of section 1385 B, which prohibits thirteen separate union unfair labor practices. As discussed above, however, none of the cases involved the interpretation or enforcement of section 1385 B 8, the only union unfair labor practice provision held unconstitutional by the district court.

2. Six of the cases, numbers 4, 5, 6, 8, 9, and 10, involved election procedures. None of the plaintiffs in this case was involved in any of those elections. In none of the six cases was there an assertion that delay created any problems.

3. The remaining six cases, numbers 14, 15, 16, 17, 18, and 19, all involved unfair labor practice proceedings against employers under section 1385 A.

Thus, of the five statutory provisions found constitutionally defective by the lower court the only one involved in any of the enforcement proceedings was section 1389, which deals with elections. Not one of these plaintiffs was involved in any way in any of those elections or any other election under the statute that they challenge. In none of the six election cases covered by the stipulation was there any allegation of unfairness because of delays.

By the time the briefs were filed following the trial, the plaintiffs had reduced to nine their challenges to

various parts of the Act.[20] The Court held three parts of the statute unconstitutional on their face, and invalidated two others in light of testimony at the trial concerning how the Act might function. Most of the court's holdings also rested on assumptions as to how the Arizona courts might interpret the relevant provisions. The sections held invalid on their face were:

1. Section 1385 B 8, prohibiting secondary consumer pressures "by the use of dishonest, untruthful and deceptive publicity."

2. Section 1392, which provides criminal penalties for violations of the Act.

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[20] In the words of the district court:

In particular, plaintiffs' arguments deal with nine separate issues and at least as many provisions of the AERA in support of their contention that the AERA is unconstitutional. Those issues and the statutory provisions dealt with are: (1) A.R.S. § 23-1385(B) (6) and (7) [generally dealing with secondary boycotts as an unfair labor practice]; (2) A.R.S. § 23-1385(B) (8) [publicity directed at the ultimate consumer regarding nonuse of agricultural product as an unfair labor practice]; (3) A.R.S. § 23-1385 (B) (12) [recognitional picketing as an unfair labor practice]; (4) A.R.S. § 23-1389 [employee representation and election procedures]; (5) A.R.S. § 23-1385(C) [access by union to workers on employer property]; (6) A.R.S. § 23-1382 (1) [exclusion of stitchers and haulers and others from AERA]; (7) A.R.S. §§ 23-1384, 23-1385 (B) (11), 23-1385(D) [elimination of "management rights" from bargaining process]; (8) A.R.S. §§ 23-1385(B) (13), 23-1393(B) [restriction and prohibition against striking and picketing]; and finally, (9) A.R.S. § 23-1392 [criminal penalties for violation of the Act]. (A. 459).

3. Section 1393 B, requiring that any employer who seeks a ten-day restraining order against a strike during harvest must, as a condition, agree to submit the dispute to binding arbitration.

The provisions held unconstitutional in light of the evidence were:

1. That part of section 1385 C which provides that neither an employer nor a labor organization shall be required to make available to the other "materials, information, time or facilities" for the purpose of communicating with employees.

2. All of section 1389, dealing with representation and elections.

Judge Craig wrote a separate opinion styled a concurrence, taking the position that the court should have abstained, "in order that the Supreme Court of Arizona might first express its opinion with respect to the constitutionality of the law established by the Arizona State Legislature." (A. 501).

On consideration of the jurisdictional issue, this Court entered its order that "further consideration of the question of the jurisdiction is postponed to the hearing of the case on the merits."

SUMMARY OF ARGUMENT

The district court should never have considered this case at all. The constitutionality of the invalidated provisions depends on state law that has not been declared and facts that have not occurred.

Foundational to American constitutional adjudication are the principles that statutes must be construed so as to save rather than destroy, and that constitutional issues should be avoided if possible. The district court acted squarely contrary to each of these principles.

This is a comprehensive, multi-faceted statute, consisting of many separate policy determinations, interrelated in the sense that they represent part of a total effort to deal with the problems of agricultural labor. The appellees attacked many separate provisions. The district court agreed with them as to five provisions. Not one of those five provisions has ever been applied to any of these plaintiffs. The district court's holding of unconstitutionality on that kind of record is unique among federal judicial decisions. In the six years of this litigation, the appellees have not suggested a single case in which this Court has authorized wholesale, checklist review of a comprehensive regulatory statute. In two cases involving labor statutes, and in numerous other cases, the Court has specifically rejected such an approach as inconsistent with the case or controversy requirement.

The district court's handling of the constitutional issues in this case frequently depended on how this state statute would be interpreted. In every single instance, the court interpreted the statute in such a way that the constitutional issue was raised rather than avoided, and in such a way that the constitutional concerns were heightened rather than lessened. And in no instance was the court aided by state court interpretations of the Act.

Even given the district court's unfounded, though necessary, assumptions of fact and assumptions of Arizona state law, its constitutional holdings concerning all five provisions are in error.

There is not much authority dealing with the prohibition of falsehood, including prior restraints, in the labor setting. The limited authority that exists, however, indicates that such falsehood can be constitutionally prohibited, even where prior restraints are involved. In any event, the maximum protection to which falsehood is entitled is the protection afforded by the *Times Libel* standard. Whether the *Times Libel* standard—knowing falsity or reckless disregard—is satisfied will necessarily vary according to the facts of the individual case. Here, there are no facts and there is no individual case.

There is no material difference between the election procedures at issue in this case and those of the NLRA. The key to the district court's holding that these procedures are unconstitutional is the shortness of some agricultural harvest seasons: for some crops the election procedures will take longer than the period of peak agricultural employment. This is not a problem that exists in every agricultural labor election, however, and it is not limited to agricultural labor. It is a problem with which the National Labor Relations Board must deal with some frequency.

There are several possible solutions to the seasonality problem. At one end of the spectrum, the California Agriculture Labor Relations Act requires that the election be held within seven days after the petition is filed, with all issues that cannot be decided during the seven-day period deferred until after the

election. The National Labor Relations Board takes another approach. It holds the elections during the current season if feasible, and if not, the election is postponed until the next peak season. The Arizona procedure steers a middle course between the two. The Arizona Board has authority to order an immediate election if appropriate in the particular case, or to postpone until the next employment peak. Assuming the constitutionality of both the national model and the California model, the district court's holding is patently erroneous. That court held unconstitutional, regardless of how applied, a procedure that permits the labor board to apply either the California model or the national model, depending on the peculiar needs and circumstances of the individual case.

This Court has made it very clear that under the National Labor Relations Act, union access to employer premises for the purpose of communicating with employees depends upon the facts and circumstances of the individual case. The most important facts and circumstances are the availability of other channels of communication, and whether the employer has discriminated against the union by allowing other distribution on its premises. Even assuming what no court has ever held, that these NLRA standards are constitutionally required, constitutionality of the AERA provision dealing with access to employer "materials, information, time, or facilities" must depend on the facts of the individual case, and cannot be decided as a general abstract matter. In some cases, alternative channels of communication will be ade-

quate. In others, they will not. But it is impossible even as a theoretical matter to decide these issues except on a case-by-case basis.

The district court and the appellees interpret the Act, erroneously in our view, to create in the employer a right to force the union to arbitrate disputes. The district court held that this presumed right of compulsory arbitration violates constitutional rights to a jury trial under the Seventh Amendment and the Due Process Clause of the Fourteenth Amendment. Nothing in the statute, however, should be interpreted as forcing the union to arbitrate.

The district court's opinion contains neither the word "incorporation" nor the words "substantive due process", and the appellees have made a valiant and an understandable effort to persuade that neither of these issues is involved. It is, however, an effort to avoid the unavoidable: Seventh Amendment rights invalidate state legislation only if (1) the Seventh Amendment is incorporated into the Fourteenth or (2) *Barron v. Baltimore* has been overruled. Similarly, if compulsory arbitration violates due process, it must be substantive due process. The cases on which the opinion relies are substantive due process cases, from the substantive due process era. Decisions in this Court and other federal courts make it very clear that state statutes providing for compulsory arbitration are not outside the scope of permissible state policy making.

Even if the district court had not erred in deciding this case in the abstract, in consistently reaching out for the interpretation of state law that invalidated, and in holding five provisions of the statute unconstitutional, it still should not have invalidated the entire Act.

Whatever may have been the approach under the older cases (from the 1930's) relied on by the appellees, the Court today properly treats severability as a corollary of the broader principle that statutes should be interpreted so as to save rather than to destroy. Applying that principle to the instant case, it is clear that the invalidity of five segments of this comprehensive labor code do not obliterate the legislature's entire work product. The statute consists of many separate policy determinations made by the Arizona legislature. They are interrelated in the sense that they constitute parts of a complete act, but most, if not all of them represent separate policy judgments that do not depend on other parts of the statute. The point is perhaps best illustrated by the unfair labor practice provisions. The Arizona legislature prohibited a total of twenty unfair labor practices, some by employers and some by unions. Even a cursory examination of those unfair labor practices reveals that they represent separate and independent legislative judgments. The legislature determined that the commission of any one of these practices is against the policy of the State of Arizona. The district court held only one of them unconstitutional. Yet it invalidated all twenty, even though none of the other nineteen depends on the one invalidated, and most of them are not even remotely

connected to it. Once again, the district court has violated its obligation to save rather than to destroy, and to avoid constitutional issues rather than raise them.

ARGUMENT

I.

THE PRESENT DISPUTE IS NOT A CASE OR CONTROVERSY. THE DISTRICT COURT THEREFORE LACKED JURISDICTION TO DECIDE IT.

Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies. If a disagreement does not rise to the level of a case or controversy, federal courts lack jurisdiction to decide it. This Court stated in *Powell v. McCormack,* 395 U.S. 486, 512-513 (1969), "In Baker v. Carr ... we noted that a federal district court lacks jurisdiction over the subject matter ... if it is not a 'case or controversy' within the meaning of that phrase in Art. III ...." This Court, of course, has jurisdiction to review the district court's holding that it could exercise jurisdiction.

Central to the case or controversy limitation is the principle that federal courts have jurisdiction to decide only those issues that are necessary to the resolution of actual, concrete controversies. As this Court stated in *Rescue Army v. Municipal Court,* 331 U.S. 549, 569 (1947):

> [C]onstitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance

> of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided.

That principle was not followed by the district court. This case is wholly hypothetical. There are no specific pertinent facts, no application of provisions of the statute to these plaintiffs, no individual pointing to facts on the record demonstrating how his constitutional rights have been affected by the application of the statute to those facts. Totally lacking in this case, therefore, is the Article III requirement that questions come into federal court only after they have been sharpened by actual disputes between the parties to the litigation.

The "record" consists almost entirely of widely varying expressions of opinion concerning what kinds of results might be expected from application of different provisions of the statute. It is not surprising that the views of the experts varied. The main evidentiary issue at the trial, and the most important factual element in the lower court's decision, concerned how long it might take to hold elections under the Arizona Act. There were no actual facts on that issue, because the court was not dealing with any particular election. The expert opinion concerning how long it might take varied from slightly over a week to a much longer, though unspecified, period. The court adopted the view of the evidence that in its opinion rendered the statute unconstitutional.

Armed with that kind of record the court proceeded to wade through a catalogue of objections to numerous sections of the statute. It found five parts, including two sections and parts of two others unconstitutional. The court then declared that the entire statute—including parts whose operation and purpose have no conceivable dependence on the sections invalidated—must fall.

This, we submit, is not case or controversy adjudication. Indeed, it is very close to the Council of Revision approach rejected by the constitutional convention, an approach under which newly enacted statutes would have been reviewed for constitutionality prior to their operation by a panel composed in part of judges.[21]

We know of no case—and in the six years of this litigation the appellees have discovered none—in which this Court has approved the wholesale consideration of the constitutionality of a comprehensive regulatory statute, each of whose challenged provisions raises separate constitutional issues, in advance of, and in

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[21] The eighth resolution in the Virginia Plan proposed to the constitutional convention of 1787 provided in pertinent part:

> that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again Negatived by an _____ [blank left in original] of the members of each branch. I Farrand, *The Records of the Federal Convention of 1787*, 21 (1966).

the absence of, the application of those provisions. The approach to that kind of statute has always been to consider the individual provisions as each is involved in concrete factual settings raising the constitutional issues of which the plaintiffs complain.

In two cases the Court has considered challenges to comprehensive labor regulatory statutes apart from the enforcement of specific provisions. *A.F.L. v. Watson*, 327 U.S. 582 (1946), and *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). In both cases the Court refused to entertain the broadside attack.

In *McAdory*, an Alabama state labor organization sought a declaratory judgment concerning the constitutional validity of certain sections of that State's newly enacted Bradford Act. The Bradford Act was described by this Court as "a comprehensive enactment regulating labor unions having members who are employees working in the State of Alabama." 325 U.S. at 455. The Act required labor organizations coming within its provisions to file various reports and financial statements and to pay filing fees. It also regulated "some phases of the internal affairs and activities of labor organizations, and various aspects of picketing, boycotting and striking." *Id.* The plaintiffs contended that the Act violated their rights of free speech and assembly. "Specifically they argue[d] that if they fail to file any of the statements required by § 7 and afterwords function as a labor union within the state, by exercising their right of free speech and assembly, they may be subjected to the criminal penalties imposed by

§ 18, and may also be enjoined from so functioning by a civil suit in equity in the state courts." 325 U.S. at 458.

In a unanimous opinion authored by Chief Justice Stone, the writ of certiorari was dismissed because "[w]e would not have granted certiorari to review so unsubstantial a question. . . ." 325 U.S. at 472.[22] Citing language from its earlier decision in *Watson v. Buck*, 313 U.S. 387, 402 (1941), this Court observed that, " 'Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications [which had not yet occurred]' this Court has felt bound to delay passing on 'the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.' " 325 U.S. at 462. Under these circumstances, constitutional adjudication was improper:

> All these considerations forbid our deciding here the constitutionality of a state statute of doubtful construction in advance of its application and construction by the state courts and without reference to some precise set of facts to which it is to be applied. *Id.*

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[22] The Court described its grant of certiorari as follows: "We granted certiorari, 323 U.S. 703, upon a petition which presented the contentions that §§ 7 and 16 impose a prior general restraint from petitioners' freedom of speech and assembly guaranteed by the First and Fourteenth Amendments to the Constitution. . . ." 325 U.S. at 454.

The appellees attempt to distinguish *McAdory* on the basis of alleged direct versus indirect First Amendment infringements. The asserted dinstinction does not help their case. There is no discussion in *McAdory* of any difference between direct and indirect infringement. In *McAdory*, as here, the plaintiffs alleged that a comprehensive labor regulatory statute violated First Amendment freedoms, not because of any particular application of the statute that had been made to the parties before the Court as presented by the record in that case, but because of the possible effect of its criminal penalties and civil injunction remedies. The Court's holding and rationale in *McAdory* control this case. As the Court stated in *McAdory:*

> We are thus invited to pass upon the constitutional validity of a state statute which has not yet been applied or threatened to be applied by the state courts to petitioners or others in the manner anticipated. Lacking any authoritative construction of the statute by the state courts, without which no constitutional question arises, and lacking the authority to give such a controlling construction ourselves, and with a record which presents no concrete set of facts to which the statute is to be applied, the case is plainly not one to be disposed of by the declaratory judgment procedure. 325 U.S. 460-61.

One year later, in *Watson*, the Court refused to entertain a suit to enjoin the enforcement of a right-to-work amendment to the Florida Constitution. In the absence of any specific application of that amendment, this Court held that in passing on the merits "at this stage of the litigation, [the district court] did not follow the proper course." 327 U.S. at 595. The Court's

reasoning is equally applicable to the dispute in the instant case:

> The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation. 327 U.S. at 595-596.

The appellees' assertion that the issues in *Watson* hinged on whether the constitutional amendment was self-executing misses the point. The reason that the district court in *Watson* erred in considering the constitutional issues was that those constitutional issues might never arise. Whether there would ever be a case or controversy depended on unresolved issues of state law. In *Watson,* one of those unresolved state issues was whether the constitutional amendment was self-executing. In the instant case, there are other unresolved state issues, discussed below. The controlling fact is that in both cases a facial attack on an unresolved state statute, in the absence of specific application of the statute, necessarily involves the Court in needless speculation concerning how the statute might be applied and how it might be interpreted. In such a dispute, there is no case or controversy and federal courts lack jurisdiction to resolve it.

Other decisions outside the labor field have substantiated the principle that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma,* 413 U.S. 601, 610-11 (1973). In *California Bankers Association v. Schultz,* 416 U.S. 21 (1974), the American Civil Liberties Union (one of the plaintiffs) sought an injunction on behalf of itself and its bank depositor members against enforcement of certain provisions of the Federal Bank Secrecy Act. The ACLU argued that the Act's reporting provisions could be used to obtain the identities of ACLU members and contributors. This would, of course, be a violation of First Amendment rights. *NAACP v. Alabama,* 357 U.S. 449 (1958). This Court declined to consider the issue for the reason that:

> This Court in the absence of a concrete fact situation in which competing associational and governmental interests can be weighed, is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred by cases such as NAACP v. Alabama, *supra.* 416 U.S. at 56.

One of the actions involved in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974) was *Blanchette v. Connecticut General Insurance Corp.* In those cases, the Court reached the merits of the two major constitutional issues concerning the Federal Rail Act of 1973. In *Blanchette,* however, it declined to pass on the constitutionality of the Act's valuation

scheme, in the absence of a "much more developed record. . . ." 419 U.S. at 146. Quoting from *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 71 (1961), the Court stated: "Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality." *Id.* at 145-46.

Even in the absence of a comprehensive statute, this Court has "often declined to decide important questions regarding the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case." *Kleppe v. New Mexico*, 426 U.S. 529, 547 (1976) (quoting *Longshoremen v. Boyd*, 347 U.S. 222, 224 (1954)). See also *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84 (5th Cir. 1975); *Wiren v. Eide*, 542 F.2d 757, 762 (9th Cir. 1976); and *Mendez v. Heller*, 530 F.2d 457 (2nd Cir. 1976).

The district court relied on a group of lower federal court decisions in purported support of its broadside attack on this statute. (A. 467). Reliance on those cases is misplaced. None involved wholesale, checklist review of a complex, comprehensive regulatory statute. Some of those cases suggest that in some circumstances, federal courts may consider a statutory provision if it has been applied in some other proceedings. Whatever the validity of that proposition in other contexts, it does not apply here. Not one of the five

invalidated provisions has ever been interpreted or enforced in any case in which the parties involved complained of constitutional inadequacies.

The lower court and the appellees also rely on *Doe v. Bolton*, 410 U.S. 179 (1973), and on the generality that the case or controversy requirement is more loosely applied in First Amendment cases. These arguments are wide of the mark. *Doe v. Bolton* involved a single statutory provision and not a comprehensive regulatory statute. In addition, absent a facial attack, the only way that the provision at issue in *Doe v. Bolton* could have been challenged was by the deliberate commission of a criminal act. That is not true in this case.

With regard to the argument that the First Amendment justifies a "roving commission"[23] approach, we know of *no* instance involving a First Amendment challenge or any other in which this Court has entertained an attack on a comprehensive regulatory statute apart from specific involvement of its provisions. *California Bankers Ass'n v. Schultz, supra*, was a First Amendent—indeed, freedom of association—challenge. Yet this Court refused to entertain it. Moreover, as will be discussed in section III of the Argument, First Amendment cases—especially freedom of assembly cases—frequently turn on the facts of the particular case.

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[23] *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973).

It would have been unthinkable, we submit, for this Court to have proceeded in checklist fashion through the provisions of the Wagner Act, or Taft-Hartley, or Landrum-Griffin, deciding the fate of each of the provisions of those statutes in the absence of a record dealing with their actual application. Yet, this is precisely what the district court did. The appellees may contend that the Arizona statute poses a greater threat to individual liberties than does its federal labor law counterpart. We would disagree. But that is not the issue. As noted, this Court has never gone through a comprehensive, multifaceted, regulatory statute in Council of Revision fashion, deciding in the abstract the constitutional acceptability of one provision after another, and then based on conclusions concerning selected parts (in this case five) declared the whole act invalid.

Even the Smith Act and the Subversive Activities Control Act—which had much greater chilling effect than can be alleged of the present statute—were considered as required by Article III: as particular provisions were applied to particular individuals in real situations, the constitutional issues were raised in

the context of those actual applications.[24] Beyond question, the opponents of those statutes would have preferred the type of procedure used by the district court here. But that is not how a judicial system bounded by case or controversy works.

The appellees' contention that there is a case or controversy consists of several parts, none of which is adequate. First, in the appellees' view, the constitutionality of the statute must be judged not just from the viewpoint of the five provisions held unconstitutional by the district court; it must also take into account other provisions concerning whose constitutionality the district court declined to rule. Second, this is an appropriate case for third party standing, so that the union may rely not only on harm to itself and its members, but also to others. Third, it is contended that this statute has already had its effects. One effect is that the appellees have been subject to temporary restraining orders, some without notice. Another is that farm worker wages and working conditions have not been as good in Arizona as in other states; boycott

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[24] Concerning the Smith Act, see *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957); and *Dennis v. United States*, 341 U.S. 494 (1951). For cases involving application of the Subversive Activities Control Act, see *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Albertson v. Subversive Activities Control Board*, 332 F.2d 317 (D.C.Cir. 1964), *rev'd*, 382 U.S. 70 (1965); *Communist Party v. United States*, 331 F.2d 807 (D.C.Cir. 1963), *cert. denied*, 377 U.S. 968 (1964); *Communist Party v. McGrath*, 96 F. Supp. 47 (D.D.C. 1951).

activities have been hindered; and the union has lost members, all allegedly because of this statute. Finally, the statute is challenged on overbreadth grounds. This, plus the existence of criminal penalties, removes the need of an actual concrete controversy.

Each of these will be briefly discussed.

A. *Provisions Not Held Unconstitutional by the District Court Are Not Before this Court for Decision.*

The appellees' statement that "it is the enforcement of the whole Act and not just those provisions discussed in the district court's opinion which must be considered when discussing the Article III implications"[25] is essential to the appellees' case. It is also wrong. The appellees asked the district court to pass on the constitutionality of many provisions of the AERA. In fact, the district court ruled on only five. If the case or controversy limitation means anything at all, it must mean that constitutional issues are resolved only as they arise in actual lawsuits. Whether the district court should have decided the other constitutional questions that the appellees requested it to decide must await another litigation, because in this case there is no lower court decision on those issues and no judgment concerning them other than a declination to rule. Even assuming that such a declination were appealable, the appellees have not appealed. Issues pertaining to parts of the Act other than the five

[25] Motion to Affirm 34.

held unconstitutional were not included in the Questions Presented, either by the Jurisdictional Statement or the Motion to Affirm.[26]

Case or controversy jurisdiction to consider the constitutionality of the five statutory provisions held unconstitutional by the district court must rest upon the enforcement of those provisions, and not the enforcement of some others that are not part of this appeal.

B. *The Third Party Standing Doctrine Is Not Applicable; Even If It Were, It Does Not Aid the Appellees' Case.*

The third party standing doctrine is not applicable to a case such as this. There is no indication in the record or elsewhere that if in fact harm results from application of any of the provisions at issue, the harmed party will not be in a position to assert its rights.

Moreover, there is no need to decide whether the third party standing doctrine is applicable to this kind of case. The reason is that of the five provisions invalidated by the district court, the only one that has been applied to anyone is Section 1389. As already noted, the record reflects no constitutional concerns—nor even complaints concerning delay—by any of the parties to those elections. Thus, even if the appellees were entitled to rely on the rights of other people, there is

[26] See Rule 40 1 (d) of the Rules of this Court.

no evidence on this record that anyone has suffered because of the application of any invalidated provision.

C. *None of The Alleged Detriments Suffered by the Appellees Relates to Any of the Five Provisions Held Unconstitutional.*

The appellees assert that "[t]he record also established beyond question that the plaintiffs suffered concrete and definite harm from application of the AERA." Motion to Affirm 35. The purported support is found in highly generalized speculation by Mr. Chavez, reprinted at pages 396 through 400 of the appendix, that boycott effectiveness, wage and hour conditions, and union membership had all declined because of this Act. There were no supporting specifics. Moreover, even if the general expression of opinion by an interested witness were sufficient to establish detriment to the union's interests in boycotts, wages and hours, and union membership, the controlling defect would still remain: under no circumstance can those speculated conditions be laid at the doorstep of the five provisions held unconstitutional because not one of those provisions has ever been applied to any of these plaintiffs. Assuming, arguendo, that Mr. Chavez's speculation may support a case or controversy, we do not know which parts of the statute were the target of his speculation. Whatever they are, they cannot be the invalidated sections, because not one of them has ever been applied to Mr. Chavez, to his union, or to any appellee.

The appellees' principal contention with respect to actual harm is that in three of the secondary boycott cases covered by the Enforcement Stipulation, temporary restraining orders were issued against them without notice or hearing. The district court did not deal with the constitutional sufficiency of any of these *ex parte* temporary restraining orders. Neither did it deal with the validity of the temporary restraining order procedure on its face. If there are constitutional deficiencies, they should be raised in the context of the particular case in which the orders were issued, based on the record in that case, because the notice requirements for temporary restraining orders depend on the facts of the particular case. *Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175 (1968).

D. *This Is Not an Appropriate Case for Application of the Overbreadth Doctrine.*

Both before the district court and also before this Court, the appellees have asserted that a particularized controversy is not necessary because their challenge is based on the statute's alleged overbreadth, and its criminal provisions.

Despite the repeated assertions that their challenge is based on facial overbreadth, the appellees have not explained how this case can be fitted within the overbreadth rationale. The vice of the overbroad statute is that it interdicts not only prohibitable, but also constitutionally protected conduct. This Court clarified in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) that the constitutional test depends not only on the magnitude of the potential statutory overreach into protected activity, but also on a comparison between the scope of

this potential overreach and the scope of the prohibitable activity. As stated by the Court: "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615. At best, the measurement of these twin requirements—that the range of constitutionally protected activity must be real, and that it must be substantial with respect to the prohibitable activity—is difficult. In the absence of a record demonstrating the activity that the challengers in fact undertook in the particular case, it is impossible. In addition, *Broadrick* suggests that its rule may depend on the extent to which "conduct and not merely speech is involved. . . ." *Id.* In an actual case or controversy the record would show the mix of speech and conduct. There is no such record here.

The appellees' offering that "the overbreadth in the AERA is certainly both *real* and *substantial*"[27] is not very helpful. The twin requirements of *Broadrick*—reality and substantiality—are not to be satisfied by a simple self-serving assertion made by parties to litigation. The requirement that the overbreadth be real means that its sweep into constitutionally protected areas must be significant. The companion requirement that it be "substantial as well, judged in relation to the statute's plainly legitimate sweep" is a relative one, comparing the substantiality of statutory overreach to the extent of its applicability to prohibitable activity. Obviously, neither of these factors—the

[27] Motion to Affirm 37. Emphasis in original.

extent of the overreach as an absolute matter, nor the comparison between the statute's overreach into protected activity and its applicability to prohibitable activity—can be measured in the abstract. Both its absolute dimension and also its comparative dimension depend on the particular facts of the individual case. Here, there are no particular facts and there is no individual case.

Section 1392, providing criminal penalties for violations of the Act, has never been enforced. Determination of its constitutionality should await a case involving its application.

The district court's holding that section 1392 is facially unconstitutional rests largely on perceived overbreadth problems. Since the criminal provision has never been applied, it is impossible to know what will be considered a "violation." of the Act. Unfair labor practices, for example, have not been treated as criminal violations. Nor have unlawful boycott activities. Substantively, therefore, this provision cannot be viewed as unconstitutional on its face as the district court held. We recognize that not only falling swords, but also hanging swords, can have an effect. However, the only reason that the district court was able to find a Damoclean effect at all is that it consistently selected the only interpretation of the statute that would raise the constitutional question. In consistently assuming the worst, the district court disregarded the principle stated by this Court in the companion case to *Broadrick, Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 578-79 (1973):

> (T)here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Application of the *Broadrick* test, therefore, depends on the existence of an actual case or controversy. Analysis of this case in light of *Broadrick* shows that here, there is no case or controversy.

II.
EVEN IF THERE WERE A CASE OR CONTROVERSY, THE DISTRICT COURT SHOULD HAVE ABSTAINED, BECAUSE THE CONSTITUTIONAL ISSUES DEPEND ON INTERPRETATIONS OF THE STATUTE.

The lower court's constitutional holdings are laced with necessary rulings as to what the statute means. In each case, the court adopted that view of the statute that would invalidate.

For example:

A. The court's holding that the election procedures are unconstitutional rests mainly on assumptions concerning the time periods that those procedures would consume. One of the assumptions—asserted by the plaintiffs for the first time at trial—is that "the general application of the Arizona Administrative Procedure Act stamps a 20-day

period . . ."[28] between the filing of the election petition and the pre-election hearing. The appellants strongly disagree with this view of Arizona law. Section 1389 C requires "an appropriate hearing on due notice." What is appropriate will vary from case to case depending upon the particular facts of that case. The Legislature having provided for an *appropriate* hearing on *due* notice takes this statute out of the general requirement of the Administrative Procedure Act (AAPA) and permits determination of the needs of the individual case.[29] The district court could not assume that Arizona state courts would interpret the section to require application of the AAPA.

B. Section 1382 1 of the Act defines a permanent agricultural employee as one "over 16 years of age who has been employed by a particular agricultural employer for at least 6 months during the preceding calendar year. . . ." The lower court asserted that the practical effect of this provision was "that a particular worker must be employed during two successive harvests before being entitled to vote." (A. 484) Given the court's view that the constitutional defect in the election procedures rested on time delays and employee transience, the conclusion that the act granted permanent employee status

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[28] District court opinion, A. 483.

[29] The pertinent part of the Arizona Administrative Procedure Act provides: "In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. *Unless otherwise provided by law*, the notice shall be given at least twenty days prior to the date set for the hearing." Ariz. Rev. Stat. § 41-1009 (Supp. 1978) (emphasis added).

only to those who had been employed for two successive harvests was significant. But none of the elections held pursuant to the Act has presented any issue of interpretation of this section. The Board could treat the matter by rule or regulation, but to date it has not. In any event the section has been neither interpreted nor applied by the Board or state courts and the interpretation by the district court in the abstract was improper.

C. The court held unconstitutional the prohibition against dishonest, untruthful and deceptive publicity directed against secondary consumers. Substantial reliance was placed on this Court's observation in *New York Times v. Sullivan*, 376 U.S. 254 (1964) *(Times Libel)*, that "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' ". 376 U.S. at 271-72. In *Times Libel*, this Court held that the breathing space requirement is satisfied by the actual malice test. Even assuming, therefore, the correctness of the lower court's determination that the Arizona Legislature's prohibition against dishonest, untruthful and deceptive secondary consumer publicity raises constitutional issues, *Times Libel* would indicate that the constitutional requirements would be satisfied by the knowing falsehood or reckless disregard standard. Whether the statutory prohibition incorporates the *Times Libel* actual malice standard is a question of Arizona law concerning which the Arizona courts have not spoken.

D. The district court held unconstitutional the provision in section 1385 C that "no employer shall be required to furnish or make available . . facilities to enable [a union] to communicate with employees . . ." In support of its holding, the court observed:

> If the grower doesn't have to 'furnish facilities' that clearly means he doesn't have to provide a time or place when the union can communicate with his workers, and thus also means that he does not have to allow them to come onto his property. (A. 496)

Throughout this litigation, the appellants have vigorously disagreed with the foregoing view of this statutory provision. The statute provides that employers are not required to provide facilities. Facilities does not mean real property. It means facilities. It means those items that might be used to facilitate communications, such as microphones, platforms, chairs, etc. It may mean structures or buildings. It clearly does not mean that the employer in all cases may deny access to his property and no Arizona court has so held.

E. This Court held in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), that the NLRB has authority to issue bargaining orders requiring an employer to bargain without a certification election in those instances where employer practices have made it impossible to hold a fair election. This Court has never suggested that *Gissel* rested on constitutional grounds. Nevertheless, the district court found the absence of specific bargaining order authority relevant to the constitutionality of the election procedures under the Arizona Act.

The authority of the Arizona Agricultural Employment Relations Board to issue bargaining orders has been the subject of strong and continuous disagreement between the parties. The Arizona courts have never passed on the issue. Once again, the district court adopted the interpretation that raises rather than avoids the constitutional issue. It interpreted the Act to preclude the issuance of bargaining orders, and that interpretation constitutes part of the premise for its conclusion that the election procedures would be applied in such a fashion as to make them unconstitutional.[30]

F. The district court's holding that section 1393 B violates federal rights to a jury trial guaranteed by the Seventh Amendment and the due process clause is bottomed on that court's view that under the statute the employer "can, without the consent of the union, submit the dispute to binding arbitration by an outsider." (A. 498) No Arizona court has ever interpreted the statute to create such a unilateral right in the employer, and the interpretation is highly questionable. For reasons discussed more fully in Section V of the Argument, the better interpretation is that section 1393 B imposes a compulsory arbitration obligation on the employer as the price he must pay for a ten-day restraining order against strikes or boycotts. The union, not having obtained a restraining order, has no price to pay. If the union wants arbitration, and the employer has obtained a restraining order, there will be arbitration, because the employer is bound to arbitrate. If the union does not want arbitration, there will be no arbitration, because the effect of the restraining

[30] A. 475, 486-87.

order is merely to bind the employer, not the union, which, at that point may elect either to arbitrate or not.

In each of these six instances, the statute could have been interpreted one or two ways. One interpretation would lead to what the lower court considered to be a serious constitutional question. The other would either totally avoid or at least lessen the constitutional concern.

Under those circumstances, the duty of the federal court is clear. It must either (1) adopt that view of the statute that will save rather than destroy[31] or (2) await an interpretation of the State Supreme Court, whose province it is to say what the statute means.[32]

The district court acted directly contrary to these established principles. In each instance, it reached out for the constitutional issue. In each instance it resolved the open question of state law in such a way that the constitutional question was raised rather than avoided.

[31] *United States v. Vuitch*, 402 U.S. 62, 70 (1971). Arizona law is in accord. *Frye v. South Phoenix Volunteer Fire Co.*, 71 Ariz. 163, 170-71, 224 P.2d 651, 656 (1950).

[32] *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941); *accord, Elkins v. Moreno*, __ U.S. __, 98 S. Ct. 1338 (1978); *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976); *Carey v. Sugar*, 425 U.S. 73, 79 (1976); *Boehning v. Indiana State Employees Ass'n, Inc.*, 423 U.S. 6, 7-8 (1975); *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 84 (1975).

In only one instance did the court offer any explanation for this unusual and improper procedure. Concerning section 1385 B 8's prohibition against untruthful secondary consumer publicity, discussed *infra*, pages 58-64, the court's opinion states:

> "Although defendants, as to this particular provision and with so many others, are always proposing the narrowest interpretation possible, and suggesting that this is the way that this, and many other provisions should be interpreted to save constitutionality of the statute, yet, as has been said, where First Amendment rights are involved, this prohibition and this section of the statute involving as it does a prior restraint on free speech must be narrowly drawn. . . . " (A. 490)

At least in the context of the holding related to section 1385 B 8, the court's holding might be understandable if a prior restraint were in fact involved. It is not. There is no record concerning any section 1385 B 8 activity. Holding that provision invalid on its face as a prior restraint assumes that the only way it will ever be enforced is by injunction, and that is not what the statute says. If in fact an injunction were issued under section 1385 B 8 against future dissemination of untruthful publicity, there would be a legitimate prior restraint issue. Absent such an injunction there is no prior restraint issue, and the asserted basis for the court's departure from the well-established rule that statutes must be interpreted so as to save them, disappears.

In the case of its other invalidating interpretations, the district court offered no explanation at all.

III
ELECTION PROCEDURES UNDER THE NLRA AND THE AERA—POLICY CHOICES BY THE LEGISLATURE AND THE JUDICIARY

The election procedures of the Agricultural Employment Relations Act have been characterized both by the district court and also the appellees as "virtually identical to those of the NLRA. . . ."[33]

That characterization is correct.

The chain of reasoning by which election procedures identical to those of the NLRA could be held unconstitutional is as follows:

1. Secret ballot election is the exclusive means by which union recognition can be accomplished under the Act.

2. In some cases, the complete election process, including union organizational activities, will take longer than the harvest season, so that the election itself cannot be held until after the harvest is over, and some of the employees have left.

3. The foregoing combination of factors, where it occurs, may discourage some agricultural workers from engaging in organizational activities. This in turn will result in a denial of their constitutionally guaranteed freedom of association.

This chain of reasoning is three times erroneous: as a matter of fact, as a matter of law, and as a matter of sound judicial and governmental policy.

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[33] District Court Opinion, A. 474. Plaintiffs' Proposed Findings of Fact Submitted to the District Court, p. 8

A. *The Absence in This Case of the District Court's Factual Premise.*

The factual error is in no way linked to any finding of fact that the district court made or that might be inferred from its holding. Rather, it is that as a matter of actual fact—undenied and undeniable—the premise underlying the court's holding is missing in this case.

That premise is that under all circumstances the AERA election procedures will consume sufficient time that the election cannot be held until after the harvest peak when many employees will be gone. All elections under all circumstances are necessarily included, because the court was considering these procedures in the abstract. It did not have the facts of any particular election before it, and its holding was not limited, even as a matter of abstract generality, to elections pertaining to crops with short harvest seasons.

In fact, the record shows that some of Arizona's harvests are not of short duration. The district court found that the citrus harvest, for example, accounts for 22% of agricultural labor in the State, the largest share of any single crop.[34] Yet the citrus harvest lasts virtually all year, from 45 to 49 weeks.[35]

The district court's opinion attempted to deal with the longer citrus harvest by the observation that "[i]n citrus, crews are constantly moved from employer to employer throughout the harvest season picking only intermittently for any particular employer for from a

[34] A. 471.

[35] A. 370-71, 472.

few days to a few weeks." (A. 472) We know of no support in the record for this statement. Assuming, *arguendo*, its correctness, however, it is irrelevant. Since it is beyond dispute that the citrus harvest lasts most of the year, an employer's crew will return from time to time, affording several opportunities during the year to hold the election.[36]

Similarly, the uncontradicted evidence shows that election procedures under the NLRA frequently deal with short, seasonal employment in a rather substantial number of industries.[37] Indeed, in many of these industries it is agricultural seasonality that limits the period of peak employment.[38]

[36] The significance of possible change in crew make up is discussed in Part C *infra*, page 56.

[37] A. 451-456. See *Ruby Co., dba Shelly Processing Co.*, 129 NLRB 110, 46 LRRM 1510 (1960) (potato processing); *Bordo Products*, 117 NLRB 313, 39 LRRM 1220 (1957) (fruit processing); *Cleveland Cliffs Iron Co.*, 117 NLRB 668, 39 LRRM 1319 (1957) (Great Lakes shipping); *Sebastopol Cooperative Cannery*, 111 NLRB 530, 35 LRRM 1510 (1955) (apple processing); *Libby, McNeill & Libby*, 90 NLRB 279, 26 LRRM 1205 (1950) (vegetable canning); *Alaska Salmon Industry*, 90 NLRB 168, 26 LRRM 1199 (1950) (salmon canning); *S. Martinelli & Co.*, 81 NLRB 1179, 23 LRRM 1361 (1949) (soft drink bottling); *California Growers, Inc.*, 80 NLRB 578, 23 LRRM 1194 (1948) (fruit packing); *Foremost Dairies, Inc.*, 80 NLRB 764, 23 LRRM 1129 (1948) (ice cream manufacturer); *Imperial Tobacco Co.*, 74 NLRB 1038, 20 LRRM 1276 (1947) (tobacco drying and processing).

[38] This is true, for example, in the case of the various agricultural packing and canning industries listed in footnote 37.

There is nothing in the district court opinion that would indicate why the problem of short employment periods should rise to the level of constitutional deficiency any more under the Arizona election procedure than under its identical federal counterpart. In fact, to the extent that there is a difference, the difference favors the Arizona law. The reason is that the Arizona Board has greater flexibility to deal with the problems of short peak employment than the NLRB has. The Arizona regulations permit the Board, where appropriate, to defer all questions except questions concerning representation until after the election. Thus, once questions concerning representation have been resolved, the Arizona Board, unlike the NLRB, has the authority to order an election immediately.[39] This effectively gives the Arizona Board the discretion to follow a procedure, where appropriate, that is very similiar if not identical to the California procedure, which the appellees apparently regard as constitutionally required.

What will be the precise effect of an election in which Arizona follows the California model and, by application of its already adopted rule, postpones all questions except representation until after the election? Will such a procedure represent an improvement over the NLRB procedure? Will it in fact be the same as the California procedure which the appellees and the district court apparently contend represents the only constitutionally acceptable model? No one can answer these questions in the abstract. They will be

[39] See Arizona Agricultural Employment Relations Board Regulations R4-2-19 and R4-2-22. A 539. See also A. 447-51, 456.

properly presented when they arise in an actual case or controversy.

In the meantime, it is readily apparent that the factual prototype—harvest seasons shorter than the election period—cannot be made to fit all cases invalidated by the district court's holding. Even if one were to assume that in some cases the disparity between length of election and length of harvest were so extreme as to infringe on freedom of association, that hypothetical circumstance does not describe this case. This case involves a total invalidation—an invalidation for all harvest seasons.

B. *The Absence of a Constitutional Prohibition Against NLRA-Type Election Procedures.*

Both the district court and the appellees have begged the question of constitutional law. It is clear that membership in a labor union is protected association. *Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 5 (1964).* From this accepted premise, the district court and the appellees leap to the conclusion that a secret ballot election procedure assumed to last beyond the employment peak is also violative. The leap is supported by neither analysis nor authority. It is an insufficient basis for interdicting the right of Arizona's legislative policy makers to act in the interest of the people of their state. There is no judicial authority of which we are aware—and the appellees have never cited any—holding that labor union election procedures may raise freedom of assembly issues. It would

be particularly startling to discover than any court had so ruled with respect to election procedures identical to those of the NLRA.

The courts that have considered the nature of the collective bargaining right have held that collective bargaining is of statutory, and not constitutional dimension: "The right to bargain collectively created by the National Labor Relations Act is a public right. The right did not exist prior to the passage of the Act." *Newport News F.F.A. Local 794 v. City of Newport News,* 339 F. Supp. 13, 16 (E.D. Va. 1972) citing *NLRB v. Edward G. Budd Mfg. Co.,* 169 F.2d 571 (6th Cir.) *cert. denied, Foreman's Ass'n. of America v. Edward G. Budd Mfg. Co.,* 335 U.S. 908 (1948). Similarly, "the right to a collective bargaining agreement, so firmly entrenched in American labor-management relations, rests upon national legislation and not upon the federal Constitution." *Atkins v. City of Charlotte,* 296 F. Supp. 1068, 1077 (W.D. N.C. 1969). *See also Milton v. City of Atlanta,* 324 F. Supp. 315 (N.D. Ga. 1971). Collective bargaining not being one of the activities of labor unions that enjoys constitutional protection, it follows, *a fortiori* that the election process, being simply one means by which the collective bargaining representative may be chosen, would not raise constitutional issues.

Even if all of these considerations could be ignored, the nearly perfect analogy to the NLRA cannot be. The appellees assert that the district court determined that "NLRA-like election procedures are unsuitable for a unique group like agricultural employees . . . ." Motion to Affirm 12 n.10. Yet neither the appellee nor the district court suggests any reason for the "unsuitability." The only conceivably relevant difference is the length of employment season, but the NLRA must also deal with seasonality problems, and the lower court's holding is by no means limited to cases where seasonality is in fact a problem.

The appellees' real complaint, properly analyzed, is this: in providing collective bargaining rights that did not previously exist, the Arizona legislators did not go as far as the appellees wanted them to go. The impact on organizational, and therefore assembly rights, is that if the legislature had done more than it did, then presumably the union would have been more effective in attracting more members to "associate" with their existing members. Therefore, the appellees' grievance with the Arizona Legislature is not a constitutional grievance. It is simply a disagreement with legitimate policy decisions reflected in the statute. As observed by the district court for the Eastern District of Virginia:

> Furthermore, while the First Amendment protects the right of American citizens to freely associate, it was never intended to provide an affirmative weapon in forcing the state to aid union organizational activities. While a state may be prohibited from penalizing or restricting union activities, the First Amendment imposes no duty on the state to provide services or engage in policies that will affirmatively assist a union to carry out its function and purpose." *Local 995, Int'l. Ass'n. of Firefighters v. City of Richmond,* 415 F. Supp. 325, 326 (E.D. Va. 1976)

The appellees' reliance on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) stands on the same footing. Neither this Court nor any other court of which we are aware—with the exception of the district court in this case—has ever held or even hinted that mandatory bargaining orders under *Gissel* are of constitutional dimension, or that government has an affirmative duty to enact labor legislation providing bargaining orders. Again, the appellees' complaint is that in providing a new collective bargaining procedure the Arizona Legislature did not go as far as the appellees would have preferred.[40]

There could conceivably be a labor election procedure so unfair that its effect on associational interests would render it constitutionally suspect. If in fact election procedures identical on their face to those of the NLRA can ever rise to the level of imposing an impermissible burden on freedom of assembly/association, the time to make that measurement and that determination will be when and if it happens.

This Court's decisions clearly demonstrate that the applicability of freedom of assembly/association principles often turns on variations in the facts of the particular case. *Compare, e.g., Feiner v. New York*, 340 U.S. 315 (1951), with *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Edwards* with *Adderley v. Florida*, 385 U.S. 39 (1966). There is no context in which the facts will vary more from case to case than in agricultural labor. As observed by Mr. Cesar Chavez, National President of the appellee union, "there

[40] This assumes that in fact bargaining orders are not available under the Arizona Act.

isn't anything typical in agriculture. It is all over the map." (A. 405)

Of the provisions held unconstitutional, section 1389 is the only one that has been either interpreted or enforced, as shown by the enforcement stipulation. It is also the only invalidated provision concerning which any substantial evidence was presented at trial. Yet neither the Enforcement Stipulation nor the trial transcript contains any evidence of a single election under the AERA in which actual application of section 1389 has borne out the appellees' speculated fears.[41] This is hardly an appropriate foundation on which to build the first case in history for the proposition that NLRB-type secret ballot labor elections can violate freedom of assembly.

C. *Policy Choices By Legislators And Judges.*

Obviously, peak employment seasons of short duration present special problems. This is true under the National Labor Relations Act, under the California Act, or under the Arizona Act. The optimum solution to those problems is neither readily apparent nor constitutionally mandated. Perhaps the most grievous error committed by the district court was its assump-

[41] The reason that these plaintiffs have not been involved in any AERA election is that since they object to the Act they refuse to use it. A. 400-401. This does not alter the fact that they have had no experience with this section concerning whose effect they could only speculate, nor the further fact that experience with elections under the Act to date has not disclosed a single instance in which time delays were a problem.

tion that the Arizona Legislature was constitutionally limited in its available policy choices to holding the election only during peak employment periods.

There are of course advantages to an inflexible requirement that elections must be held during the employment peak. It permits greater participation during the same season in which the election petition is filed. This basic solution was the one selected by the California Legislature; under its statute, an election must be held within seven days after the petition is filed.[42]

There are also disadvantages to such a system, however. First, it gives the union substantial control over the date of the election. By manipulating the time that it files the election petition, the union can control the date of the election within a maximum leeway of seven days. Second, the California procedure permits the union to organize as long as the union considers it advantageous, and then to limit post-petition campaigning by both sides. Post-petition campaigning is limited to seven days, but there is no limit on pre-petition campaigning by the union. Indeed, Mr. Chavez acknowledged that the reason the pre-petition organizational activities took three to six weeks was

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[42] California Agricultural Labor Relations Act, Cal. Lab. Code § 1140 *et. seq.* Section 1156.3(a) (West Supp. 1978), requires that the Board "shall direct a representation election by secret ballot . . . within a maximum of seven days of the filing of the petition." Under this procedure, it is theoretically possible for the election to be carried by as few as 26% of the peak employment workers. The election must be held when at least 50% of the employees are present, and a majority of those 50% would be 26%. See A. 405-06.

that the union used that period not just to assure that it had enough support to qualify the petition, but also to assure that it had enough support to win the election.[43] A third disadvantage is that in most instances, seven days is too short a period to determine the appropriate bargaining unit. While this and other pre-election issues can be deferred until after the election, it is certainly not an unreasonable legislative decision to conclude that it is more orderly to leave it to the Board's discretion whether to decide these issues before the election is held.

An alternate to the California scheme is the one employed by the NLRB: hold the election during the current season if it is feasible to do so. If it is not, postpone the election until the next peak season, at a date to be determined by the regional director. *Choctaw Cotton Oil Co.*, 84 NLRB 660, 24 LRRM 1307 (1949). This permits the Board to take into account all relevant factors—including the advantages of current peak season elections—rather than restricting the Board to one factor alone. When an industry has two or more seasonal peaks, as is the case with much of Arizona's agricultural production, the delayed representation election is ordered at the time the greatest number of workers is employed.[44] Appellees have not taken issue with the Board's authority to follow the same procedure where appropriate.

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[43] A. 346-50.

[44] See, *e.g.*, *Libby, McNeill & Libby*, 90 NLRB 279, 26 LRRM 1205 (1950); *California Growers, Inc.*, 80 NLRB 578, 23 LRRM 1194 (1948). See also A. 451-56.

Mr. Chavez objected to postponement until the following employment season because the work force might change in the meantime.[45] This argument cuts both ways. To whatever extent it is true, it necessarily means that one group of employees will make representation decisions that will be binding on a significantly different group of employees. This will be true no matter when the election is held. Faced with that kind of situation, the Legislature must have some discretion in making the required policy choices. Certainly the Constitution does not require the Legislature to favor employees who work in the first season—some of whom will not return to be bound by the election decision—over employees in the second season who will be bound.[46]

The approach chosen by the Arizona legislators represents a middle ground between the national model and the California model. Unlike California, Arizona does not mandate a short election period in all cases. Unlike the National Labor Relations Board, however,

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[45] A. 374. He also asserted that some of the pro-union employees might not be rehired. If the reason that they were not rehired is because of their union activity, the appropriate corrective would be an unfair labor practice proceeding against the employer under Ariz. Rev. Stat. § 23-1385 A (Supp. 1978)

[46] Even in California, it is not always possible to hold the election during peak employment periods. A. 366-67, 373-74. In such a case, the California Board has followed the NLRB procedure. Thus, where the California Board found it necessary to order run-off elections because of unavoidable delay resulting from the determination of objections to the conduct of the initial election, it ordered the run-off to be held during the employer's next peak season. *In the Matter of Tenneco Farming Co.*, 3 ALRB No. 20 (1977).

the Arizona Board has the flexibility to employ such a procedure where appropriate. If one assumes the constitutionality of both the NLRA and the California election procedures, it is difficult even as an abstract conceptual matter to perceive how a procedure that permits the flexibility to follow either of these models, depending on which is the more appropriate in the particular case, can be held unconstitutional without regard to how it is applied.

The appellees urge that "the Act must be nullified in all its provisions and returned to the legislature to strike a new balance." Motion to Affirm 32. They also assert that thedistrict court's opinion will foster experimentation by providing "some of the first concrete judicial guidelines", which will permit "a wide variety of union recognition and election procedures in the unique field of agriculture." *Id.* 44-45. These are intriguing comments. Just what new balance is to be struck? What are the concrete guidelines, and what is included within the wide variety of recognition and election procedures that they permit? Apparently the only "new balance" that is constitutionally permissible in the appellees' view is the California procedure. Moreover, the Constitution not only requires that procedure; it requires that it be written into the statute rather than permitted by regulation in those cases where in the judgment of the Board it is appropriate. If the appellees' view prevails, therefore, the "new balance" has already been struck by the district court. There is nothing left for legislative choice.

For over four decades this Court has vigilantly prevented judicial meddlesomeness into legitimate state legislative efforts to deal with important issues.[47] The same problem is presented by this case. Few important policy issues are easily soluble. Labor elections in seasonal industries are no exception. The California Legislature has elected one solution. The National Labor Relations Board has elected another. Arizona policymakers, we submit, are not confined to preferring one of these choices over the other. Neither are they constitutionally precluded from steering a middle course between the two.

IV.
THE PROHIBITION AGAINST FALSE SECONDARY CONSUMER PRESSURES DOES NOT RAISE ANY SERIOUS CONSTITUTIONAL ISSUES ON THE FACE OF THIS RECORD

Section 1385 B 8 of the Arizona Act, held unconstitutional on its face by the district court, makes it an unfair labor practice:

> To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or

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[47] See *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *Nebbia v. New York*, 291 U.S. 502 (1934). In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976), this Court stated: "That [the state] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional."

> encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name. (A. 513)

There is no realistic difference between section 1385 B 8 and its federal counterpart in the proviso to section 8 (b) (4) (ii) (B) of the NLRA. The federal proviso authorizes "publicity . . . for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute. . . ." 29 U.S.C. § 158 (b) (4) (ii) (B) (1970). One permits truthful publicity and the other prohibits untruthful, deceptive and dishonest publicity. There is no practical difference—certainly none of constitutional dimension—between authorizing the truthful and prohibiting the untruthful.

In *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1964) *(Tree Fruits)*, this Court interpreted the proviso in section 8 (b) (4) (ii) (B) of the NLRA to permit a union to apply secondary consumer pressures by picketing as well as by handbilling against the product of an employer with whom the union has a primary dispute. The issue under section 1385 B 8 of the present Act differs from the issue in *Tree Fruits* in two respects, and the differences cut in opposite directions. First, the Arizona provision deals with all secondary consumer pressures,

whereas *Tree Fruits* dealt only with picketing. Second, it does not prohibit all such publicity, but requires merely that it be truthful.

This case does not arise out of specific facts involving any proceeding under subsection B 8. The unfair labor practice defined by that subsection was held unconstitutional on its face. Thus, this provision which so closely parallels its federal counterpart upheld in *Tree Fruits* was held unconstitutional without regard to how it might be applied.

The district court's holding of facial invalidity is subject to three errors, any one of which is sufficient to require reversal.

A. First, the holding rests on the assumption that any possible application of subsection B 8 will always involve a prior restraint. The prior restraint assumption was the only justification advanced by the district court for refusing to interpret the subsection so as to save it rather than invalidate it. The two principal cases upon which the district court relied, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) and *A.F.L. v. Swing*, 312 U.S. 321 (1941), both involved prior restraints. The appellees also recognize that their position is based on an assumption of prior restraint. Their second question presented characterizes subsection B 8 as "a statute which calls for prior restraints. . . ." Motion to Affirm 2.

The premise that any conceivable application of subsection B 8 will involve a prior restraint is erroneous. The conduct prohibited by this subsection is an unfair labor practice. As such, it can be dealt with by the Board or by the courts. Neither is limited to pro-

hibiting future activities. Sanctions for past conduct may also be imposed without a future prohibition. Consideration of section 1385 B 8 on its face, therefore, does not raise the prior restraint issue. The time to consider *Keefe* and *Swing* — and the time to consider the correctness of the district court's holding that injunctions or cease and desist orders against future dissemination of false secondary consumer publicity are unconstitutional — will be when, if ever, an injunction or cease and desist order is issued pursuant to this subsection. In six years of the statute's existence, none has issued yet. The prior restraint question was therefore not properly before the district court.

B. Even if the district court's assumption that application of subsection B 8 would always involve prohibition against future conduct were correct, it would still be error to hold that under no circumstances could a prohibition against falsehood in a labor setting be sustained. Holdings in this Court and others indicate that enjoining future falsehoods in a labor setting must rest in the discretion of the trial court, subject to the prerequisites historically required for this equitable remedy, and subject to appellate review.

The district court's total invalidation of subsection B 8, without regard to its application, effectively holds that under no circumstances may government prohibit a union or an employer from distributing false information concerning the dispute between them. That is not the law, and should not be.

It is possible that in the labor setting, falsehood is not entitled even to *Times Libel* protection. The section 8(b)(4)(ii)(B) proviso is instructive in this regard. So also is *United Farm Workers Organizing Committee v. Superior Court*, 4 Cal.3d 556, 483 P.2d 1215, 94 Cal. Rptr. 263 (1971), a case brought by the appellee union's predecessor. In that case the California Supreme Court ruled that "Petitioners may properly be enjoined from making false and untruthful statements in connection with a labor dispute." *Id.* at 571; 483 P.2d at 1226; 94 Cal Rptr. at 274. Similarly, in *Corrigan v. Barbers and Beauticians Union, Local 253*, 251 Cal. App.2d 490, 59 Cal. Rptr. 533 (1967), the California Court of Appeals held that the distribution of "false and misleading literature" or the carrying of "false and misleading banners" in a labor dispute may be enjoined.

In *NLRB v. Gissel Packing Co.* 395 U.S. 575 (1969) this Court held the employer to a standard of truth in making statements concerning the impact that union organization would have on its employees. *Gissel* did not involve a prior restraint, but it dispels the notion that in a labor context there is complete license for falsehood. Taken together with the California cases, which involved injunctions, it clearly rejects the district court's holding that any application of A.R.S. section 1385 B 8 would be unconstitutional.

C. Finally, this Court has made it very clear that the maximum First Amendment protection to which falsehood is entitled is that afforded by the *New York Times v. Sullivan*, 376 U.S. 254 (1964) *(Times Libel)*,

actual malice standard. That was the holding in *Times Libel*, and the point was made even more clear in *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964):

> [T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality ....' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

If the prohibition against untruthful secondary consumer pressures is subject to the same strictures held applicable in *Times Libel*, then the first task of the federal judiciary should be to determine whether the *Times Libel* actual malice test applies to this statute. In *Elfbrandt v. Russell*, 384 U.S. 11 (1966), this Court took into account the Arizona Supreme Court's interpretation of the knowledge or intent requirement applicable to Arizona's loyalty oath. A no lesser opportunity should be afforded in connection with this statute, which has significantly greater impact on the people of Arizona. Similarly, the interpretation of the statute in *Tree Fruits* by a majority of this Court was influenced at least in part by the principle that statutes should be interpreted, if possible, so as to make

them constitutional."[48] The Arizona courts should be given the same opportunity.

The question of knowing or reckless disregard is a question of fact. It cannot be assumed that false statements will never be made with knowledge of or reckless disregard for their truth or falsity. Neither can it be assumed that under no circumstance would the Arizona courts permit a *Times Libel* defense.

V.
COMPULSORY ARBITRATION, SUBSTANTIVE DUE PROCESS, AND INCORPORATION OF THE SEVENTH AMENDMENT

Understandably, the appellees attempt to avoid the fact that the district court has held the Seventh Amendment incorporated into the Fourteenth, contrary to the unanimous voice of decisions in this and other courts.[49] Thus, the appellees point out that the district court "does not even mention or discuss the 'incorporation' of the Seventh Amendment . . . " Motion to affirm 28.

Whether the district court intended to raise the incorporation issue is immaterial. Whether stated in the opinion or not, the lower court has necessarily held the Seventh Amendment binding on the states. It held,

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[48] 377 U.S. at 63.

[49] See headnote 12 to the annotations to the Seventh Amendment in United States Code Annotated for citations to the relevant cases. For illustrative holdings, see *Olesen v. Trust Company of Chicago*, 245 F. 2d 522 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957); *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La.) *aff'd*, 409 U.S. 943 (1972); *U-Haul Co. of Alabama v. State*, 316 So.2d 685 (Ala. 1975); *Bringe v. Collins*, 274 Md. 338, 335 A.2d 670 (1975).

"We therefore strike down this section of the statute, A.R.S. § 23-1393(B), as unconstitutional and in violation of the due process clause of the Fourteenth Amendment to the Constitution and the Seventh Amendment providing for right to trial by jury." (A. 499) Similarly, the appellees assert that, "clearly no state can attempt to remove the resolution of such disputes from all court jurisdiction, including federal courts, without violating federal rights to a trial by jury." Motion to Affirm 28. Where are these "federal rights to a trial by jury" found? The only "federal rights to a trial by jury" that rise to the level of constitutional guarantee in a civil case are found in the Seventh Amendment, as the district court recognized. These Seventh Amendment rights are not binding on the states unless either (1) the Seventh Amendment directly applies to the states, thereby overruling *Barron v. Baltimore*, 7 Pet. 243 (1833) or (2) the Seventh Amendment is incorporated into the Fourteenth.

Neither does the due process clause provide adequate foundation for invalidation of the arbitration provision. The "clear denial of due process"[50] to which the district court refers is substantive due process. The cases on which its opinion relies are substantive due process cases from the substantive due process era. The principal case *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923), was decided just two months after *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) and relied on *Adkins* as authority. Moreover, there is no other aspect of due process on which the district court's

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[50] A. 498.

decision could rest. Neither the lower court nor the appellees point to any procedural defect raised by the so-called compulsory arbitration provision. Rather, it is that as a matter of substance the district court characterized this provision as "depriving parties of liberty and property without due process of law . . . ." (A. 498)

This Court has made it very clear that the substitution of judicial policy-making for legislative policy-making under the aegis of due process is no longer acceptable. *Ferguson v. Skrupa,* 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421 (1952). This principle clearly applies to binding arbitration of labor disputes. *Country-Wide Insurance Company v. Harnett,* 426 F. Supp. 1030 (S.D.N.Y.), *aff'd.* 431 U.S. 934 (1977) involved a challenge to the compulsory arbitration provisions of New York's "No Fault" insurance Law. The basis of the challenge, and the reasons for its insufficiency were the same as in this case. As stated by the three-judge district court opinion in *Country-Wide:*

> Arbitration is a reasonable alternative to a judicial determination of insurance claims and, at least so long as no fundamental rights are involved, the state may choose to provide any rational method of dispute settlement that comports with the basic procedural safeguards required by due process. Cf. *Goldberg v. Kelly,* 397 U.S. 254, 266-71, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).
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> Plaintiff relies on *Wolff Packing Co. v. Indus. Court,* 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 (1923); *Dorchy v. Kansas,* 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686 (1924), and *Wolff Packing Co. v. Indus. Court,* 267 U.S. 552, 45 S.Ct. 441, 69 L.Ed. 785 (1925). These cases held that attempts to fix wages and compel arbitration were constitutionally impermissible because the industries there (*i.e.,* meat packing and coal mining) were not sufficiently 'clothed with a public interest', to justify these regulations. This 'public interest' standard was expressly rejected in *Nebbia v. New York* . . . .
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> The Court has steadily rejected the substantive due process approach exemplified by *Wolff* and *Dorchy,* espousing a constitutional doctrine under which 'the due process clause is no longer to be so broadly construed that * * * state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.' *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.,* 335 U.S. 525, 536-37, 69 S.Ct. 251, 257, 93 L.Ed. 212 (1949). 426 F. Supp. at 1032-1033.

Moreover, the district court's opinion assumes that this provision[51] gives the employer the unilateral right to compel arbitration. It is not at all apparent that the Arizona courts would interpret the statute to give the employer such a right. The statute imposes a compulsory arbitration obligation on the employer in the event that he seeks a ten-day injunction, but it does not impose such an obligation on the union, and it was improper for the district court to assume that the Arizona courts would so interpret it. The effect of this provision is that an employer who obtains a ten-day restraining order under this statute must pay a price: he must agree to submit the dispute to binding arbitration. The district court apparently based its conclusion on the sentence in the statute providing that "in the event the parties cannot agree on an arbitrator within two days after the Court awards a restraining order, the Court shall appoint one to de-

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[51] Section 23-1393(B) states in relevant part:

In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues.

cide the unresolved issues."[52] This sentence does not impose a compulsory arbitration obligation on the union, however; it merely provides a procedure in the event the union elects to take advantage of the employer's statutory obligation to arbitrate, but the parties are unable to agree on an arbitrator. In any case, it was clearly improper for the district court to assume a unilateral right in the employer to invoke compulsory arbitration.

VI.
THE DISTRICT COURT'S HOLDING CONCERNING ACCESS TO FACILITIES IS BASED ON THREE ERRONEOUS ASSUMPTIONS

The district court held section 1385 C, dealing with the employer's "materials, information, time or facilities", (A 515) unconstitutional in light of the testimony and evidence. It is true that any constitutional issues possibly raised by this section can be determined only in the light of facts. The kind of facts required, however — even assuming that the Arizona courts would construe the section as the district court did, adverse to its constitutionality — are not part of this record.

The leading case dealing with union organizing activity on employer premises under the National Labor Relations Act is *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956). In that case the Court treated the problem as one of statutory rather than constitutional dimension. The Court clarified the requirements of section 8 (a)(1) of the NLRA in this respect:

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[52] *Id.*

> It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature *if reasonable efforts by the union through other available channels of communication will enable it to reach the employees* with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. 351 U.S. at 112. (emphasis added).

This Court further observed in *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972), that "[t]he Board and the courts have the duty to resolve conflicts between organization rights and property rights, and to seek a proper accommodation between the two."

There is no suggestion in *Babcock and Wilcox* or *Central Hardware* that the requirements of section 8(a)(1) represent a constitutionally irreducible minimum. This point was reemphasized by *Hudgens v. NLRB*, 424 U.S. 507 (1976), involving striking members of a union picketing in front of their employer's store located in a shopping center. The Court observed that, "the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act." *Id.* at 521.

Even assuming that the section 8(a)(1) standards were constitutionally required, and assuming further that the Arizona courts would interpret facilities to mean premises, the unmistakable teaching of this Court's holdings is that union access to employer premises depends on the facts of the particular case. Specifically, the pertinent facts are the availability of other channels of communication, and whether the employer has discriminated against the union by allowing other distributions. There is of course no

evidence concerning these issues on the record in this case, because the case does not involve any specific application of the provision in question.[53]

Despite its assertion that its ruling on section 1385 C was in light of the evidence, the district court's only factual determination related to this provision is its reference to "testimony and other evidence and really not disputed by defendants that the vast majority of farm workers are migratory and generally reside in areas or labor camps located on property owned by the employer ...." (A. 493). This assertion is not supported by the evidence (See A. 402-05, 406) and is "disputed by defendants." Far more important, however, the controlling facts do not concern where the

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[53] Indeed, though the district court declared that its holding concerning this subsection was one of the two provisions in connection with which evidence needed to be considered, (A. 462) the court did not list Section 1385 C as one of the provisions as to which evidence was presented. The opinion states: "Evidence presented during the four day trial was introduced relative to A.R.S. §§ 1384, 1385(A) (5), 1385 (B) (11), 1385(D), 1389, and on the plaintiffs' claim that the exclusion of stitchers and haulers and sixteen-year olds from the AERA, § 1382(1) and 382(1) (g), was a violation of the Equal Protection Clause as well as a similar claim that exclusion of those farm workers who did not work for the same employer the previous calendar year from presentation elections was likewise a violation of the Equal Protection Clause." *Id.* at 461-62.

workers live, but whether there are adequate alternative means of communication, and whether the employer has discriminated.[54]

The appellees concede that "Since the existence of adequate alternative means of communication will vary from case to case, that determination must be left for the appropriate Board or court to determine in each instance." Motion to Affirm 25. Having made that concession, the appellees rest on the assertion that "the Arizona legislature has left no room in § 23-1385(C) of the AERA for such accommodation and balancing between these competing interests." *Id.* This assertion is essential to the appellees' position, but it is wrong. The availability of other means of communication depends on the individual facts of particular cases, and not on the language of the statute. This statute does not say that under no circumstances may alternatives be permitted. As the statute is applied, there will doubtless be some farms and some employment situations where the alternate communication channels are adequate. There may be others where they are not. That determination must await the facts

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[54] The district court's suggestion that Section 1389 I somehow forecloses alternatives is obviously wrong. Section 1389 I deals only with the employer's obligation to furnish a list of employees in connection with an election. It has nothing to do with alternative means of communication, which would vary from case to case, depending on such physical circumstances as the layout of the employer's property, the employer's attitudes concerning the use of that property, and other nearby property that might be used for publicity purposes.

of actual cases or controversies. Once again, the problems attendant upon adjudication in the abstract are apparent.

The district court's holding necessarily rests on three assumptions: (1) that under Arizona law facilities does not mean facilities, it means premises; (2) that the *Babcock and Wilcox* standards are constitutionally required; and (3) that under all circumstances in which section 1385 C will be applied, the employer will violate the requirements that there be other available channels of communication and that there be no discrimination against the union by allowing other distribution.

If any one of these three assumptions falls, so also must the district court's holding concerning section 1385 C. All three are erroneous.

VII.
THE DISTRICT COURT ERRED IN CONCLUDING THAT CONSTITUTIONAL DEFECTS IN PARTS OR ALL OF FOUR SECTIONS REQUIRED INVALIDATION OF THE ENTIRE ACT.

The AERA consists of fifteen sections. It prohibits twenty unfair labor practices. The five provisions found constitutionally defective include one of the twenty unfair labor practices, two of the fifteen sections, and parts of two others.

Of these fifteen sections, the district court held that only two were totally invalid. (One of these, section 1392 dealing with criminal penalties, the court conceded to be severable.) (A. 468) It also found

constitutional defects in parts of two other sections.[55] The court therefore declined to find constitutional defects in the great majority of the statutory provisions, including many vigorously attacked by the appellees. Nevertheless, the entire Act was held unconstitutional.

This wholesale invalidation flies in the face of common sense and the square holdings of this Court. The point is best illustrated by the unfair labor practice provisions. The Arizona Legislature has concluded that the twenty practices described in subsections 1385 A and B are inimical to state policy. Each represents a separate policy determination. They include such practices as employer interference with his employees' rights to join and participate in union activities, employer domination or interference with the formation or administration of labor organizations, secondary boycott activities, union picketing of an employee's home, and violent conduct for the purpose of preventing the marketing of agricultural products. Before the district court, the appellees advanced constitutional challenges to six of the twenty unfair labor practices, parts 6, 7, 8, 11, 12, and 13 of Section 1385 B. The court ruled in their favor on only one of the six, Section 1385 B 8. Despite the court's declination to accept the appellees' arguments concerning five of the six challenged unfair labor practices, the appellees have succeeded in invalidating not only the remaining five,

[55] Two of the five invalidated provisions are parts of the same Section, 1385, B 8, prohibiting untruthful, etc. secondary consumer pressures, and 1385 C dealing with access to employer facilities.

but also the fourteen that they did not even challenge. This includes the prohibitions against *employer* unfair labor practices, which are no more dependent on any of the invalidated provisions than if they appeared in a separate statute. Six of the twenty cases brought under the Act as of January of 1977 were unfair labor practice proceedings. (See Enforcement Stipulation. A. 79) None of those cases depended in any way on the existence of any of the five invalidated provisions. The State has a legitimate interest in continuing to prohibit and punish unfair labor practices, either by employers or by unions.

The district court's only justification for its broadside interdiction of the statute is contained in two sentences. In its discussion of the election procedures, the court asserts that: "If [Section 1389, dealing with elections] fails, the rest of the Act must fail, since most of the use of the Act would apply only if farm workers were initially free to organize and not if the exercise of such a constitutional freedom of assembly were made impossible." (A. 482). Similarly, at the conclusion of its opinion the court states that its holding concerning election procedures, "coupled with the other sections struck down, results in a complete perversion of the expressed intent of the Legislature to allow agricultural employees to 'be free to organize, take concerted action and, through representatives of their own choosing, enter into collective bargaining agreements establishing their wages and terms and conditions of employment . . . .' " (A. 499)

The factual error of these *a priori* assertions is readily demonstrable. In addition, they represent a total failure even to consider, much less apply, the standards for severability prescribed by this Court. Each of these errors warrants brief discussion.

Concerning the factual error, it is nothing less than astounding that in concluding that the elimination of the five sections held unconstitutional would result "in a complete perversion of the expressed attendant legislature . . " the court would select just one phrase from the legislature's Declaration of Policy, and declare that single phrase to be the statutory purpose. There were many purposes, as shown not only by the Declaration of Policy,[56] but even more by the structure of the Act.

Very simply, the proscriptions against employers' making financial contributions to a union, or against a union's picketing an employee's home, stand on their own as policy determinations by the Arizona Legislature. They do not depend on election delays, arbitration, untruthful secondary consumer picketing, or union access to employer facilities. Even if the district court were right as to the five provisions held unconstitutional, the legislative determinations remain that Arizona needs an agricultural labor board; that that board needs authority to conduct investigations, issue subpoenas, hold hearings, order reinstatement and back pay, and issue cease and desist orders concerning 19 uninvalidated unfair labor practices; that even though the bargaining representative cannot be chosen by the employees in a secret ballot election as

[56] A. 504.

determined by the Legislature, the collective bargaining process should be conducted according to law; that contracts resulting from collective bargaining are entitled to statutory protection; that physical threats against consumers should not be permitted; and so forth.

Even if the district court's perception concerning legislative purpose were correct, it clearly failed to apply the proper standards for severability. The general rule was stated by this Court in *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932), as follows:

> The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

This rule from *Champlin Refining Co.* has been restated by recent cases, and appears to represent the most authoritative general statement of the law of severability. See *Tilton v. Richardson*, 403 U.S. 672, 684 (1971); *United States v. Jackson*, 390 U.S. 570, 585 (1968). The appellees purport to derive from *Carter v. Carter Coal Co.*, 298 U.S. 238, 312, 313 (1936) a rule "that the absence of a statutory provision for severability creates a presumption against severability." Motion to Affirm 30. Today, that proposition is about as firm as the principal holding in *Carter v. Carter Coal Co.* In *United States v. Jackson*, this Court declared that "whatever relevance such an explicit [severability] clause might have in creating a presump-

tion of severability ... the ultimate determination of severability will rarely turn on the presence or absence of such a clause. Thus, for example, the Court in *Champlin,* after stating the basic test quoted above, cited cases in which invalid statutory provisions had been severed despite the absence of any provision for severability." 390 U.S. at 585 n.27. *Tilton v. Richardson, supra,* demonstrates that the presence or absence of a severability clause is not a major issue: "Nor does the absence of an express severability provision in the Act dictate the demise of the entire statute." 403 U.S. at 684.

This Court further observed in *Tilton* that:

> The restrictive obligations of a recipient institution under § 751(a)(2) cannot, compatibly with the Religion Clauses, expire while the building has substantial value. This circumstance does not require us to invalidate the entire Act, however. 'The cardinal principle of statutory construction is to save and not to destroy.' *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 .... 403 U.S. at 683-84.

Therefore, whether *Carter v. Carter Coal Co.* ever stood for the principle advocated by the appellees is not important. What is important is that this Court has integrated its approach to the severability issue into the larger principle that statues should be interpreted so as to save rather than destroy.

CONCLUSION

From the narrow perspective of this case, we would welcome a decision on the merits. The case is here, the statute is important, and the district court obviously erred. As one of the sovereign states in a federal union, however, the State of Arizona has a broader and more important interest at stake, the preservation of the principle that federal court jurisdiction is limited to cases or controversies.

In either case, the judgment of the district court must be reversed.

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OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, et al.,
Defendant-Appellants,

AND

ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor-Appellants,

VS.

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Arizona

BRIEF FOR THE APPELLEES

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, et al.,
Defendant-Appellants,

AND

ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor-Appellants,

VS.

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Arizona

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the district court (A. 457-501) is reported at 449 F.Supp. 449.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution provide in pertinent part:

FIRST AMENDMENT: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

FOURTEENTH AMENDMENT: ". . . [Nor] shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE ARIZONA AGRICULTURAL EMPLOYMENT RELATIONS ACT (AERA); Arizona Revised Statutes (A.R.S.), Title 23, Ch. 8, Section 23-1381 *et seq.*, the text of which is set forth in the Appendix at 504 *et seq.*

Rule 65, Arizona Rules of Civil Procedure, incorporated in the AERA (§§ 23-1393(A) & (B)), the text of which is set forth as Appendix "A" to this brief.

Section 23-1301(1), Arizona Revised Statute (1971), incorporated in the AERA (§ 23-1382(7)), the text of which is set forth as Appendix "B" to this brief.

The Arizona Secondary Boycott law, A.R.S. Section 23-1321, incorporated in the AERA (Section 23-1385(B)(6)), the text of which is set forth as Appendix "C" to this brief.

QUESTIONS PRESENTED

1. Is an Article III Case or Controversy presented by a challenge to a statute when:

(1) that statute has been steadily enforced against the plaintiffs over a five year period resulting in concrete, identifiable injuries;

(2) the statute imposes criminal penalties for the exercise of the very activities the plaintiffs had undertaken in the past and desire to continue to undertake;

(3) the statute is facially overbroad throughout, proscribing numerous forms of protected First Amendment speech activity?

2. In an action alleging facial invalidity of a statute for violating First Amendment rights of speech and association should a federal court abstain when (1) the meaning and operation of the statute is certain on its face, (2) it does not—without an actual rewriting—lend itself to interpretation by state courts which would avoid the constitutional issues, and (3) there is no likelihood of an expeditious state court proceeding that would resolve the constitutional questions raised?

3. Three separate provisions of the AERA provide for the issuance of *ex parte* temporary restraining orders without notice against the appellees' speech activities; one of those mandates an automatic restraining order without notice or hearing against union boycotts and strikes or threat thereof, merely upon proper application by an employer. May the State constitutionally sanction the issuance of *ex parte* restraining orders without notice or opportunity for hearing in the area of basic freedoms guaranteed by the First Amendment?

4. Section 1385(B)(8) of the AERA makes unlawful "dishonest, untruthful and deceptive publicity" as well as communications relating to workers' industry-wide concerns. Does a statute which provides for prior restraints on such communications and imposition of criminal penalties upon a labor organization and its members who under-

take them, prevent the uninhibited and robust public debate protected by the First Amendment?

5. Can a State constitutionally forbid communications between all representatives of labor organizations and members of the public on important issues related to labor disputes?

6. Do the provisions of Section 1385(B)(12) which outlaw all recognitional and organizational picketing and boycott activity, including informational picketing, merely upon the filing of an election petition by an employer, unconstitutionally restrict First Amendment rights?

7. Arizona has withdrawn from farmworkers all right to use concerted economic action to secure recognition of a collective bargaining representative and has replaced these rights with an unworkable election procedure. The State has further imposed extensive restrictions on issues of vital concern to workers that can be raised during negotiations. Do such direct and damaging restraints upon the fundamental and essential union functions of recognition and bargaining unconstitutionally infringe upon farmworkers' and their union's right of association?

8. Can a State constitutionally strip a state labor board of all discretion to order an agricultural employer to furnish material, information, time or facilities to allow communication between unions and workers?

9. Does a statute which imposes widespread restraints upon the exercise of fundamental rights by some farmworkers but not of others who are similarly situated violate the Equal Protection Clause when the classification

chosen bears no relation to the stated objectives of the statute?

10. Does a comprehensive and frequently overbroad regulatory statute which makes any violation of any of its terms a crime, thereby making numerous recognized and accepted labor practices punishable as "crimes," prohibit conduct protected by the First Amendment?

STATEMENT OF THE CASE

In 1972, amid efforts to unionize by Arizona farmworkers and publicity to consumers about the farmworkers' plight,[1] the Arizona Legislature enacted the Agricultural Employment Relations Act, a criminal statute purporting to regulate farm labor relations comprehensively.[2] The AERA declares as Arizona policy: "[A]gricultural employees shall be free to organize, to take concerted action, and through representatives of their own choosing enter into collective bargaining contracts establishing their wages and terms and conditions of employment."[3] But the substantive provisions of the Act systematically strip unions, workers, and the interested public of any meaningful way to realize this promise. The Act, which appellant growers helped to draft,[4] expressly makes unlawful and criminal the very methods

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[1] *See, gen.*, testimony of Cesar E. Chavez, A. 290 *et seq.*, describing organizational activities by the United Farm Workers of America, AFL-CIO, in Arizona since approximately 1965.

[2] Arizona Revised Statutes, Title 23, Ch. 8, Section 1381 *et seq.* (A. 504 *et seq.*; hereinafter referred to as "AERA" or "Act".) Unless otherwise specified, all statutory references are to the AERA.

[3] § 1381.

[4] Motion and Application to Intervene as Defendants filed by the Arizona Farm Bureau Federation, the Arizona Grape Growers' Association, and Yuma Citrus Shippers' Association (October 1, 1973), at 4, ¶ III(e).

which the United Farm Workers of America, AFL-CIO (hereinafter "UFW" or "Union") had been using in Arizona to communicate the benefits of unionization to the workers and the facts of labor disputes to the public. The Act broadly proscribes activities which are lawful for other workers in Arizona and throughout the country[5] and inhibits rights of association which are constitutionally guaranteed even in the absence of any statutory regulation.

The AERA governs each stage of the collective bargaining process: communication with the workers and public, selection of representatives, discussion of subjects affecting the employer-employee relationship, and economic levers which make agreement attractive. The three-judge[6] District Court below heard four days of testimony from experts on agricultural labor relations and National Labor Relations Board[7] practice called by both sides[8] and accepted into evidence detailed stipulations by the parties listing

[5]Appellants describe the AERA as "modeled after the NLRA in its overall structure and operation, but tailored in many respects to the peculiar conditions of agricultural labor." Brief for the Appellants, at 5. Comparison of the AERA to the NLRA, however, reveals the deletion, addition, and modification of key NLRA provisions in a manner unrelated to the special characteristics of agriculture. Compare, *e.g.*, § 1385. Significant departures from the NLRA are found which serve no apparent purpose other than to undercut the Act's espoused policy of freedom to organize and to bargain through representatives of the workers' own choosing.

[6]A. 52, 59.

[7]Hereinafter referred to as "NLRB". The National Labor Relations Act, as amended (29 U.S.C. § 150 *et seq.*), is referred to as "NLRA".

[8]The experts were: Cesar E. Chavez, farm laborer, farm labor organizer, and President of the UFW; Stanley Lubin, former NLRB staff attorney, labor attorney and professor; George Campbell, agricultural economist; and James Cherry, former NLRB Officer in Charge for Arizona.

enforcement proceedings under the Act[9] and describing the growing schedules and employment patterns in all major Arizona crops.[10] Upon the evidence adduced at trial, the District Court invalidated the entire statute as frustrating, rather than promoting, association for collective bargaining purposes. It found the election procedures illusory, the prohibitions on speech to publicize labor disputes overbroad, and the twin sanctions for violation of any provision of the Act—criminal penalties and injunctions obtainable *ex parte* and without notice—unconstitutionally oppressive.[11]

The three-judge Court found the Act's election procedures the "threshold" farmworkers must surmount to exer-

[9]Stipulated Statement of Status of Past and Pending Actions Taken in Accordance With the Agricultural Employment Relations Act, A. 79-191 (hereinafter referred to as "Enforcement Stipulation").

[10]Stipulation Regarding Harvest and Pre-Harvest Seasons, A. 192-289 (hereinafter referred to as "Seasonality Stipulation").

[11]The District Court invalidated the Act on the basis of five provisions it found unconstitutional: § 1392 [criminal penalties]; § 1389 [representation elections]; § 1385(B)(8) [consumer publicity]; § 1385(C) [restrictions on access]; and § 1393(B) [prior restraints].

Appellees alleged that eleven sections on their face violate the First and Fourteenth Amendments (A. 23-42): § 1385(B)(7) [prohibitions and restraints on primary boycott speech activities directed to retailers]; § 1385(B(8) [prohibitions and restraints on consumer-directed speech]; § 1385(B)(11) [collective bargaining prohibitions and restraints]; § 1385(B)(12) [prohibitions and restraints on picketing, boycotting, or threats thereof]; § 1385(B)(13) [ban on strike by minorities]; § 1390 [temporary restraining orders without notice]; § 1392 [criminal penalties]; § 1385(C) [denial of access]; § 1382(2) [definition of employer]; and § 1382(6) [definition of labor dispute]; § 1393 [prior restraints].

Appellees further alleged that three additional sections are unconstitutional as applied to farmworkers: § 1389 [representation elections]; and §§ 1384 and 1385(D) [collective bargaining restrictions]. The Pre-Trial Order submitted all of these allegations to the Court for decision. A. 70-71.

cise their right to associate together in unions.[12] From this perspective, the District Court made specific findings of fact, based upon the expert testimony at trial, that the AERA's election process borrows the NLRA form but lacks the substance of a workable democratic selection of representatives in the agricultural context.

The Act requires the filing of a petition which alleges the representative's support by at least thirty percent of the workers in the unit and the prior refusal of the employer to accord recognition.[13] A Board investigation and hearing follows[14] which, the District Court found, on the basis of NLRB experience, is held fourteen to twenty-one days after the petition's filing.[15] The AERA places no time limitations on this process. The Act then allows an employer ten days after the Board directs the election to submit his list of eligible voters' names.[16] From the testimony and the election provisions themselves, the Court calculated that the AERA's election process would take at least six or seven

[12]A. 481.

[13]§ 1389(C)(1).

[14]§ 1389(C).

[15]A. 474.

[16]§ 1389(I). This provision departs from NLRB practice significantly attenuating the AERA's election procedures, as applied to agriculture. In elections under the NLRA, the employer must file a list of names *and addresses* of eligible voters within *seven* days of the direction of an election or approval of a consent election. This mandate facilitates free and informed choice by employees and avoids delay of the election procedures through challenges to voters. *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240-43, 61 LRRM 1217, 1218-19 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

The rationale for the AERA's deliberate modification of the NLRB list requirement is unclear. The seasonal character of agriculture argues for shortening, not lengthening, the time for submitting the list. And the migratory nature of the workforce should require an emphasis on addresses, rather than their omission.

weeks for a contested election[17] and termed this transplanting of NLRB procedures of well-known length into an agricultural setting "legislated delay."[18]

Relying on the stipulation and testimony, the three-judge Court found that the length of harvest seasons ranges from three or four weeks for canteloupes, lettuce, and grapes to ten or eleven months for citrus and green onions.[19] The period of peak[20] agricultural employment in these crops ranges from two or three weeks in the more seasonal canteloupes, lettuce, and grapes to the length of the harvest season in citrus and green onions.[21] The Court further found, however, that even in the crops with long harvest seasons, certain factors interfere with stable employment: Work is often intermittent as crops do not follow each other successively, and workers must often switch employers to keep working in the same crop or area. In the citrus, whole crews are "constantly moved from employer to employer throughout the harvest season picking only intermittently for any particular employer for from a few days to a few weeks."[22] In the green onions, despite its long harvest season, the workforce undergoes "tremendous turnover because workers are paid on a daily cash basis and because many minors are employed."[23] Following a schedule distinct from the seasonal pattern of the crops,

[17]A. 474.

[18]A. 499.

[19]A. 471-72.

[20]"Peak period" in this case has been defined as that period of time when fifty per cent or more of the highest number of agricultural workers are employed. A. 471.

[21]A. 471-72.

[22]A. 472.

[23]*Id.*

many workers migrate, leaving an area at the end of a harvest to find work elsewhere, often not returning to the same employer in successive years.[24]

Under such circumstances, as the District Court found, union organizing efforts take approximately three to six weeks, the time occupied by union representatives seeking out all the fields where employees of the employer are working, identifying workers, contacting them, and discussing with them the benefits of unionization.[25] Because of the seasonality, migrancy, and turnover mentioned above, such organizing necessarily cannot be accomplished until the harvest season.[26] Only after these organizing efforts can the lengthy election procedures dictated by the AERA be invoked.

From its findings concerning the seasonal and migratory character of agriculture, the District Court determined the AERA's election process excessively long and conducive to delay, effectively nullifying whatever freedom of association for union organizing purposes the AERA declares as its purpose.[27] In addition to recognizing the constitutional irreconcilability of the lengthy statutory procedure with the overwhelmingly seasonal agricultural industry, the three-judge Court also factually found the Act's limitation of eligible voters to those workers employed in two successive harvests to disenfranchise the great number of migratory and transitory workers.[28] The court concluded that the virtual unworkability of the AERA's election proce-

[24] *Id.*
[25] A. 473.
[26] *Id.*
[27] A. 482-83.
[28] A. 484-85.

dures in the agricultural setting deals a blow of constitutional proportions to the Act's promise to employees of freedom to select and act through freely chosen representatives.[29]

The District Court invalidated other patently unconstitutional provisions of the AERA, also on the basis of their crippling impact on the ability of agricultural employees to exercise First Amendment organizational rights and their "perversion of the expressed intent of the Legislature to allow agricultural employees 'to be free to organize, take concerted action and [bargain] . . .' "[30]

The Court held the Act impermissibly denies unions an opportunity to communicate with Arizona farmworkers

[29] In addition to importing a lengthy election schedule, the AERA enacts significant departures from the NLRA's language by adding provisions favoring the employer. The Act liberalizes the employer's ability to file an election petition, permitting a petition when the employer doubts the bargaining agent's representative status. § 1389(C)(2). Compare 29 U.S.C. § 159(c)(1)(B). The Act extends the time for decertification to allow a petition during the certification period. § 1389(J). Compare 29 U.S.C. § 159(e)(1). And, the AERA shortens the voter eligibility period for economic strikers from one year (29 U.S.C. § 159(c)(3)) to three months (§ 1389(G)) after the commencement of the strike, a period which renders any such strikers in a crop with a season longer than three months ineligible to vote.

The AERA also imposes a requirement, found nowhere in the NLRA, that

> . . . In any election the voters shall be afforded the choice of "no union". If in a representational election where more than one union is on the ballot, and none of the choices receives a majority vote, a second election shall be held. *The second election shall be between the union receiving the highest number of votes and "no union."* A.R.S., § 1389(D); emphasis added.

Where two rival unions garner a majority and the two highest vote totals in a representation election, the AERA frustrates the obvious choice of the workers for union representation by forcing a run-off with the "no union" minority choice, rather than between the two unions.

[30] A. 499.

about unionization or collective bargaining. Based on a factual finding that most farmworkers are migratory or live in areas or labor camps located on the employer's property,[31] the court reasoned that Section 1385(C)'s negation of any requirement to make "materials, information, time, or facilities" available amounts to an affirmative authorization to deny such availability;[32] this provision, by its terms, further allows an employer to ban communication by employee as well as non-employee union organizers.[33] In light of Section 1385(C) and Section 1389(I), the Court concluded that the Act allows a union *only* a list of employees' names, without addresses, ten days after an election has been directed.[34]

The Act sweeps aside rights at other stages of the collective bargaining process. The AERA requires all publicity persuading consumers to refrain from buying or using any agricultural product to be "truthful, honest, and non-deceptive" in content and prohibits primary boycott publicity involved with industry-wide concerns or directed against any trademark or generic name which does not solely include the product of the employer with whom a union has a primary dispute.[35] Based on an array of precedent, the District Court invalidated Section 1385(B)(8), holding that its overbreadth handicaps speech to publicize a labor dispute.[36]

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[31]A. 474, 493.
[32]A. 495-96.
[33]A. 496.
[34]A. 495.
[35]§ 1385(B)(8).
[36]A. 487-92.

The AERA also forbids peaceful persuasion of a store manager to decide not to handle the product of an employer with whom a union has a primary dispute.[37] Upon recognition or certification, the Act denies a union the opportunity to press the employer to bargain about hiring, discharge, transfer of employees, crew size, work assignments, change in operations, sub-contracting, successorship, and a host of other subjects defined as "management rights"[38] Any strike or boycott or threat of a strike or boycott, whether for recognition or a contract, may be halted by an employer's petition for an election[39] or application to the superior court.[40]

The AERA does not merely proscribe the above-mentioned conduct as unfair practices; violation of *any* provision of the Act is a crime, punishable by a fine of up to five thousand dollars and/or one year imprisonment[41] *and* enjoinable *ex parte* without notice.[42] The District Court held that the Act's criminal sanctions enforce the systematic elimination of protected rights of speech and association from the AERA's illusory guarantee of collective bargaining for farmworkers.[43]

The Board and courts have enforced the AERA against the UFW, its members, and its supporters among the public unrelentingly since its passage. By the time of trial in January, 1977, a wide range of the substantive and pro-

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[37]§ 1385(B)(7).
[38]§§ 1384, 1385(D), 1385(B)(11).
[39]§ 1385(B)(12)(C).
[40]§ 1393(B).
[41]§ 1392.
[42]§§ 1390(K), 1393(A), 1393(B).
[43]A. 464-70.

cedural provisions appellees challenge had been enforced, including the restrictions on speech to aid boycott and strike activities, the procedural weapon of summary injunctive relief without notice or hearing, and the election provisions. The Enforcement Stipulation details the various charges, contentions, procedural steps, and outcome in each enforcement case.[44]

For example, Safeway Stores, in a series of actions begun in 1973, used the Act to stop the UFW from informing the public about its labor dispute with grape and lettuce growers. Safeway petitioned an Arizona superior court for injunctive relief generally under all of the unfair labor practice provisions defining union violations, Section 1385 (B).[45] After the superior court ruled subsection (B)(7) unconstitutionally vague, yet granted Safeway injunctive relief against the UFW and its supporters,[46] the Agricultural Employment Relations Board (hereinafter "AERB" or "Board"), continuing to enforce (B)(7), pro-

[44]The stipulation shows, *inter alia*, that seven lawsuits and two administrative complaints have been filed by private parties or the Board against the UFW and its members and supporters to enjoin conduct covered by the Act's provisions.

[45]Enforcement Stipulation, at Item 2; A. 80-82, 93-113.

[46]*Id.*, at Item 2A; A. 80, 93-105. In its opinion, the superior court considered the UFW's conduct under subsections (B)(6), (7), (8), (9), and (12). These subsections broadly restrict secondary boycotts, union appeals to consumers and store management personnel, picketing and strikes. Appellants err in urging that (B)(8), declared unconstitutional by the District Court, was never enforced against the UFW. In the Safeway case, Safeway expressly relied upon § 1385(B)(8) and the superior court examined enforcement of this provision. (A. 102.) In two other lawsuits, liquor distributors and retailers obtained temporary restraining orders without notice to enjoin the UFW's boycott of Gallo wines based upon complaints that alleged violation of all of § 1385(B), including § 1385(B)(8). Enforcement Stipulation, at Items 7 and 13; A. 84, 88.

ceeded on a complaint against the UFW for the very same conduct.[47]

Liquor distributors and retailers, suing individually and in class actions, sought injunctive relief against the UFW's publication of its dispute with Gallo and other wine companies, similarly alleging violation of Section 1385(B) in its entirety.[48]

In other actions, the AERB sought relief against the UFW for specific violations of subsections of Section 1385(B). In one AERB proceeding based on charges filed by five liquor stores, the Board refused to consider the constitutionality of the subsections allegedly violated.[49] The AERB applied to the superior court for injunctive relief against UFW liquor store activities on behalf of the same five stores, and the court issued an injunction banning *all* communication with store managers regarding the boycotted product.[50]

Arizona courts also enforced subsection (B)(10) against the UFW to restrain picketing and strike activities at D'Arrigo Brothers, a lettuce producer, after the employer obtained a temporary restraining order without notice to the Union.[51]

[47]*Id.*, at Item 2F; A. 81. The AERB here charged the UFW with violations of subsections (B)(6), (7), and (8).

[48]*Id.*, at Items 7 and 13; A. 84, 88.

[49]*Id.*, at Item 11; A. 85. The Board's complaint alleged violations of subsections (B)(6) and (7).

[50]*Id.*, at Item 12; A. 87. Appendix D; *see* fn. 159, *infra*. In this case, the Board also alleged violations of subsections (B)(6) and (7).

These two actions were brought in 1975, two years after the superior court ruling in the Safeway case that subsection (B)(7) was unconstitutional and subsequent to the AERB's continued enforcement of (B)(7) in the same case concerning Safeway.

[51]*Id.*, at Item 1; A. 79-80.

Both the Board and private parties have invoked the procedural provisions of the AERA authorizing temporary restraint without notice or hearing. Three separate sections of the Act permit this summary relief.[52] In two actions brought by liquor retailers in response to the UFW's publicity of its dispute with Gallo, temporary restraining orders were issued, without notice to the UFW. One of the two actions was dismissed upon the Union's motion to quash service and never re-served.[53] In the other, a class action, one plaintiff was later dismissed for lack of standing, several plaintiff retailers were found not properly in the class, and the action was ultimately dismissed as to the remaining plaintiffs because of insufficient evidence.[54]

In a third case, the AERB invoked Section 1390(K) to secure a temporary restraining order without notifying the UFW. The injunction restricted all Union communications to the liquor store management under (B)(7), the section held unconstitutional by another superior court.[55]

These expensive and duplicative proceedings in the state courts and before the AERB, spanning several years,[56]

[52]§§ 1390(K), 1393(A), 1393(B).

[53]Enforcement Stipulation, at Item 7; A. 84.

[54]*Id.*, at Item 13; A. 88.

[55]*Id.*, at Item 12; A. 87. *See* n. 50, *supra.*

[56]Between trial and the District Court's judgment and opinion, the AERB obtained a temporary restraining order without notice or hearing under § 1390(K) against the Maricopa County Organizing Project to enjoin picketing by striking vegetable workers.

The Board also issued a complaint against the UFW and the Maricopa County Organizing Project based on charges filed by eight growers. The complaint alleged violations of § 1385(B)(2) [threatening or imposing sanctions for non-compliance with union rules]; § 1385(B)(10) [threatening or engaging in violent conduct]; § 1385(B)(11) [restraining employers in the exercise of management rights]; § 1385(B)(13) [calling a strike without approval by a majority of the employees]; § 1384 [management rights]; and § 1381 [the declaration of policy]. Upon application of the AERB, a temporary restraining order was issued under § 1390(K) based on the complaint. Pursuant to Rule 41(5), Rules of the Supreme Court, defining a party's obligation to bring relevant new matters to the attention of the Court, appellees attach the complaint and temporary restraining order as Appendices E and F, hereto. *See also, Fusari v. Steinberg*, 419 U.S. 379, 387, n. 12; and 390-91 (Conc. Opin. of Burger, C.J.) (1974). The Court may take judicial notice of these documents as official state court records. *Commonwealth of Pennsylvania v. Brown*, 373 F.2d 771 (3rd Cir., 1967); *Wagner v. Fawcett Publications*, 307 F.2d 409 (7th Cir., 1962); *St. Paul Fire & Marine Insurance Co. v. Cunningham*, 257 F.2d 731 (9th Cir., 1958).

forced the UFW and individual members and supporters to defend against allegations of violation of all the union unfair labor practice provisions of the AERA. These actions resulted in substantial restraint of activities aimed at communicating the facts of labor disputes to the public. Temporary injunctions obtained against the UFW without notice and hearing in actions later dismissed or where restrictions on conduct were modified when the Union was given an opportunity to contest the action nonetheless involved considerable infringement of activities and legal costs.[57]

As reflected in the parties' stipulation, the AERA's election procedures have been invoked nine times. The nine petitions filed with the Board potentially involved hundreds of workers.[58] Only three petitions actually resulted in elec-

[57]In addition to the temporary orders which were later dismissed or modified, Safeway initiated contempt proceedings alleging that the UFW and several supporters had violated the superior court's preliminary injunction. The contempt hearing resulted in modification of the injunction. Enforcement Stipulation, at Item 2D; A. 81.

[58]The nine petitions involved Bodine Produce Company, Inc., Ever-Krisp Vegetables, Inc., Tanita Farms, Cook Produce, Cactus Distributors, Inc., J. A. Wood Company, G & S Produce, Shamrock Farms, and Olson Dairy. Enforcement Stipulation, at Items 4, 5, 6, 8, 9 and 10; A. 82-85; Seasonality Stipulation, A. 223, 229, 244 and 270.

tions, all upon the employer's consent.[59] Two of the nine petitions were filed by employers, in each case seeking to halt recognitional picketing.[60] Hearings scheduled in both cases were not held with the petitions being withdrawn by the employers prior to any election. The four remaining petitions were filed by the Teamsters Union at lettuce ranches in the 1974 fall harvest season and were contested by the employers.[61] One of these petitions was dismissed by the Board.[62] Two were withdrawn at the end of the season by the petitioning Teamsters prior to the scheduling or holding of any election.[63] The fourth petition resulted in an election scheduled for a date one week after the end of the harvest season, a time when the majority of the employees had left the ranch; this petition was also withdrawn.[64] These statistics compare with over 400 elections in neighboring California[65] during the first five months of operation of the California Agricultural Labor Relations Act.[66] The principal contestants in California[67] were the

[59]Cook Produce, Enforcement Stipulation, at Item 4A; A. 82-83.
Shamrock Farms, *Id.*, at Item 9; A. 85.
Olson Dairy, *Id.*, at Item 10; A. 85.

[60]J. A. Wood Company, *Id.*, at Item 6; A. 84.
G & S Produce, *Id.*, at Item 8; A. 84.
Section 1385(B)(12)(C) provides that it shall be an unfair labor practice to engage in picketing or boycott activity, or to threaten to do so, where a petition has been filed under § 1389.

[61]Bodine Produce Company, Inc., Ever-Krisp Vegetables, Inc., Tanita Farms, and Cactus Distributors, Inc., Enforcement Stipulation, at Items 4B, 4C, 5; A. 83-84.

[62]Tanita Farms, *Id.*, at Item 4C; A. 83.

[63]Bodine Produce Company, Inc., and Ever-Krisp Vegetables, Inc., *Id.*, at Item 4C; A. 83.

[64]Cactus Distributors, Inc., *Id.*, at Item 5; A. 83-84, 229-30.

[65]A. 328.

[66]California Labor Code, § 1140 *et seq.* (West's Supp. 1978).

[67]A. 315-16.

Teamsters, responsible for six of the nine Arizona petitions, and the UFW.[68]

The UFW lost all but one of the collective bargaining agreements it held in Arizona upon the passage of the AERA, and a significant part of its active membership.[69] Unrebutted testimony at trial establishes that since passage of the Act, the wages and benefits of agricultural workers in Arizona have not kept pace with the improved wages and benefits of farmworkers in other states.[70] Arizona farmworkers' participation in concerted activities to better wages, hours, and working conditions has lessened since the AERA became law in Arizona,[71] and supporters who once assisted in UFW boycott activities have become uncertain of their rights and fearful of harassment.[72]

SUMMARY OF ARGUMENT

Past enforcement of the AERA, the present threat of continued enforcement, and the Act's facial overbreadth amply establish a justiciable controversy under Article III, Section 2. By trial, many of the challenged substantive and procedural provisions had been enforced against the UFW, its members, and supporters. The State and private parties initiated nine lawsuits and AERB actions. Three

[68]The grower appellants affirmatively alleged in their Motion and Application to Intervene as Defendants that there are essentially two organized groups involved in labor disputes in Arizona, the UFW and the agricultural producers. Motion, *supra*, at n. 4, at 4, ¶ III(f).

[69]A. 399-400. UFW President Cesar E. Chavez testified that the UFW employers who had willingly negotiated contracts with the UFW were not interested in negotiating after the passage of the AERA. A. 399.

[70]A. 398.

[71]A. 399.

[72]A. 398; R. 273.

temporary orders restraining conduct protected by the First Amendment were issued *ex parte* and without notice, one obtained by the Board itself. The enforcement history alone fully reveals a justiciable controversy.

Even were there no enforcement, the AERA's criminal sanctions of up to a five-thousand dollar fine and one year imprisonment and the administrative and judicial enforcement mechanisms available to private parties present a viable threat of prosecution and severe economic injury to the Union, its agents, members, and supporters, against whom the AERA expressly operates. The Act regulates speech and associational conduct protected by the First Amendment. Farmworkers and their supporters may not constitutionally be required to violate the AERA subjecting themselves to criminal prosecution and economic sanctions to obtain relief. *Doe v. Bolton,* 410 U.S. 179 (1973); *Craig v. Boren,* 429 U.S. 190 (1976).

The Act, on its face, also effects a real and substantial suppression of protected First Amendment activities. The whole range of protected speech and associational activity, from oral conversation to handbilling to picketing, may be (and has been) prohibited without notice under the Act's provisions. This facial overbreadth separately states a justiciable controversy.

The District Court properly refused to abstain from ruling on substantial constitutional questions raised by the unambiguous provisions of the statute. *Pullman* abstention is an equitable doctrine applied only where the challenged statute presents a narrow, uncertain issue of *state* law *and* is obviously susceptible of a construction eliminating the federal constitutional question and capable

of resolution in a single, swift state proceeding. *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496 (1941); *Zwickler v. Koota,* 389 U.S. 241 (1967). Neither requirement is satisfied here. The State and growers instead walk a narrow semantic tightrope over a constitutional abyss straining to inject uncertainty into peripheral issues, resolution of which would leave the overriding constitutional questions raised by the appellees untouched. They suggest alleged uncertainty only as to six phrases that appear in three sections of the law but fail to obfuscate the obvious meanings of phrases such as "calendar year". The language of the challenged sections is not uncertain; the federal issues are unavoidable.

Abstention would cause procedural delay and overwhelming costs to the Union, entailing years of state court litigation, as the UFW renews and reserves its federal claims at the state level in isolated enforcement actions, ultimately to return to this Court repeatedly for resolution of the same claims before the Court in this action. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964).

While the District Court invalidated the AERA on the basis of five unconstitutional provisions, Appellees address not only these but also present argument as to other provisions fully litigated and briefed before the lower court which are asserted as additional grounds for affirming the judgment of the District Court.[73]

Sections 1393(A), 1393(B), and 1390(K), the procedural provisions affording judicial enforcement of all of the

[73]All these issues were fully briefed and presented to the District Court which found it unnecessary to reach all of them. As this Court stated in *Dandridge v. Williams,* 397 U.S. 471, fn. 6 (1970):

The prevailing party may, of course, assert in a reviewing

Act's substantive provisions, on their face authorize issuance of restraining orders *ex parte* and without notice. Because these provisions sanction prior restraint of rights guaranteed by the First Amendment, all three must fall. *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175 (1968). Further, Section 1393(B), found unconstitutional by the District Court for other reasons, places in an employer's hands the power *automatically* to restrain any boycott, strike or threat thereof.

Notice is essential in First Amendment cases to ensure that restraints are narrowly tailored to protect free expression by allowing participation of the opposing parties. *Carroll, supra.* The special vice of those prior restraints sanctioned by the AERA is that communication can be (and in fact has been) suppressed before an adequate determination that it is unprotected by the First Amendment. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 391 (1973).

Substantively, the statute imposes unconstitutional restrictions on consumer boycott free speech activities. Section 1385(B)(8) prohibits "inducing" or "encouraging" the

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court any ground in support of his judgment whether or not that ground was relied upon or even considered by the trial court. [citations] As the Court said in United States v. American Ry. Express Co., 265 U.S. 425, 435-36, 44 S. Ct. 560, 564, 68 L. Ed. 1087 '[I]t is likewise settled that the appellee may without taking a cross-appeal urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect the decree entered below. It merely asserts additional grounds why the decree should be affirmed.'

See also, Jaffke v. Dunham, 352 U.S. 280, 281 (1957); *Swarb v. Lennox,* 405 U.S. 191, 202 (1972), White, concurring; *Ohio Bureau of Employment Service v. Hodory,* 431 U.S. 471 (1977).

ultimate consumer of an agricultural product from buying that product by means other than "truthful, honest or non-deceptive publicity." Thus, this provision places in administrative and judicial hands the power to determine whether speech is true. This Court, in *New York Times v. Sullivan* [*Times Malice*], 376 U.S. 254 (1964), and more recently in *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971), has clearly and forcefully stated that the courts are not concerned with the truth or validity of published speech, for such censorship inhibits that vigorous free-wheeling debate long guarded by this Court.

Section 1385(B)(8) further unconstitutionally prohibits "inducing" or "encouraging" a consumer not to buy agricultural products unless they are produced "by an agricultural employer with whom the union has a primary dispute." Such a limitation is impermissible under *A.F.L. v. Swing,* 312 U.S. 321 (1941), where this Court struck down an attempt to halt picketing relating to industry-wide concerns. Under the AERA, handbilling and oral conversation are additionally prohibited.

Section 1385(B)(8) further prohibits inducement of any boycott of trade names, trademarks, or generic names which do not *solely* include the product of the employer with whom a union has a primary dispute, thus eliminating entirely the ability to boycott the great number of products grown by small, medium, and large growers which lose their identities in the marketplace through middlemen, canneries, wineries, marketing associations, and packing houses. This provision also eliminates publication of information of general concern to an entire industry, such as

the use of dangerous pesticides by specific growers. Both labor unions and the public have a legitimate interest in free-flowing discussion of such subjects.

Section 1385(B)(7) prohibits peaceful, orderly conversations by a labor organization or its agents with management personnel of retail stores asking that they refrain from selling boycotted products. Thus, pure speech in aid of a primary boycott is made unlawful and criminal. Arguments based on moral, economic, religious, environmental, labor, political, or any other grounds are prohibited if they encourage retail support for a product boycott during a labor dispute. A clergyman could not ask a store manager to remove a product for moral reasons related to a labor dispute. An environmentalist speaking for a union could not argue that pesticides may contaminate certain produce and therefore should not be sold.

Section 1385(B)(12) broadly prohibits labor organizations from picketing, boycotting, or threatening to picket or boycott an agricultural employer for recognitional or organizational purposes where an election petition has been filed under Section 1389. Since Section 1389(C)(2) allows an employer to file an election petition, Section 1385(B)(12) extends to a grower the unrestricted power to prohibit picketing and boycott activities. Not only is the provision facially overbroad in its regulation of activities protected by the First Amendment, but it operates as an unlawful prior restraint of such activities.

Section 1385(B)(12) further proscribes such picketing and boycott activities where their object is informational communication of a labor dispute's facts, and thus non-

coercive "encouragement" or "inducement" of support for a union's position. This section does not accommodate vital free speech rights to publicize the facts of a labor dispute.

At the heart of the Act stands the recognition procedure adopted by the Arizona Legislature. Limiting past rights, the Act denies farmworkers any opportunity to engage in concerted economic action to compel recognition. In place of economic action, the Legislature has dictated that a collective bargaining representative must be recognized only after an election. However, upon an examination of the statutorily-mandated election procedures, it immediately becomes apparent that workers' efforts to designate a collective representative will necessarily be frustrated. In spite of the short seasons which prevail in Arizona agriculture, the Act requires completion of extensive pre-election proceedings which cannot be concluded within the duration of a season. Not only do these election procedures thus frustrate workers' associational interest in securing recognition of a collective bargaining agent, but the Act statutorily prevents many workers from participating in representation determinations. In spite of the acknowledged migratory pattern in Arizona agriculture, the Act excludes all workers who have not worked for an employer during the preceding calendar year. Without any substantial justification, these workers are relegated to an excluded status.

Even if successful in designating a collective bargaining agent, workers are faced with numerous restrictions upon the right to bargain over wages and terms and conditions of employment which the Act purports to extend. Issues

such as hiring, discharge, suspension, crew size, work assignment, and working hours cannot be bargained forcefully at the negotiating table without subjecting a negotiator to possible criminal penalties and an injunction issued without notice restraining such bargaining. This repudiation of rigorous bargaining on matters of fundamental concern to agricultural employees renders a union impotent to advance the interests of its members. By substantially restraining the effective exercise, in the collective bargaining context, of the right to associate, the Act impermissibly interferes with rights protected by the Constitution.

Section 1385(C) of the Act denies the Board discretion to order "materials, information, time, or facilities" which would enable a labor union or its agents to communicate with farmworkers, who, as the District Court found, migrate and live in labor camps located on property owned by the employer. Even where no alternative means of communication exist, the AERB cannot require that an employer provide *time* or *place* for communication between employees and union representatives; nor can the AERB order an employer to provide *information* only he possesses (with the sole statutory exception of a list of voters' names, without addresses, ten days after a representation election has been directed), permitting a union to reach at least those employees who live off company property. A union has a First Amendment right to communicate its message and employees to listen, but the statutory scheme expressly precludes all possible means of communication, and dis-

ables the AERB from requiring means of communication in any and all cases.

The AERA's restrictions and prohibitions on First Amendment activities effect an important denial of equal protection, for they apply to most farmworkers, but not to those engaged in hauling, stitching or off-the-field packing. Section 1382(1). This distinction bears no relation to the avowed purpose of the AERA to ensure "the uninterrupted production, packing, processing, transporting, and marketing of agricultural products . . ." As undisputed testimony established, a strike by haulers and stitchers or shed workers can stop *all* field work. Yet the Act pointedly excludes these workers. The State and growers point to no compelling interest or rational basis for these exclusions; indeed, none exists. Those farmworkers excluded from the AERA are free to improve their lot by those traditional means denied to farmworkers covered by the Act, perpetuating ghettos of poverty in the fields of Arizona.

Violation of any provision of the AERA is a crime punishable by a fine of up to five thousand dollars and one year in jail, or both. Thus, the AERA is an overbroad criminal statute sweeping traditionally protected First Amendment activities within its ambit.

The AERA is not, as appellants claim, modeled after the NLRA yet tailored to agriculture. One cannot analyze the Arizona statute without concluding that it was deliberately designed to create insurmountable obstacles to the use of traditionally protected First Amendment activities, to the use of the representation procedure, and to the use of collective bargaining as a meaningful tool. While States are laboratories of experimentation, they must experiment

above and not below the constitutional floor. The substantive prohibitions of the AERA provide fuel to keep its procedural engines of prior restraint running. Appellees do not seek in this Court a super-legislature or a council of revision, but simply an affirmation of the District Court's judgment that the AERA is unconstitutional.

ARGUMENT

I.

THIS CHALLENGE TO THE AERA PRESENTS A JUSTICIABLE CONTROVERSY UNDER ARTICLE III ON THE BASIS OF THE ACT'S ACTUAL ENFORCEMENT AGAINST THE UFW AND ITS MEMBERS, ITS THREATENED IMPOSITION OF CRIMINAL SANCTIONS AND ITS FACIAL OVERBREADTH.

The five year enforcement of the AERA against the UFW, its members and supporters, the Act's all-encompassing criminal sanctions, and the AERA's statutory prohibitions and limitations on fundamental rights of speech and association amply satisfy the case or controversy requirement of the U.S. Constitution, Article III, Section 2, and compel the exercise of federal jurisdiction. To avoid this conclusion and deflect consideration of the AERA's fundamental constitutional infirmities, the State[74] minimizes the actual extensive restraint of UFW picketing and boycott activities, glosses over the omnipresent threat of criminal enforcement, and departs from its own characterization of the AERA as a "comprehensive, multi-faceted statute"[75] of interrelated policy determinations. The most elemental logic compels the conclusion that past enforcement of the Act's provisions heightens the present disabling impact of the regulatory system as a whole and stands as a threat of future enforcement.

[74]Hereinafter, unless the context otherwise indicates, the terms "the State" and "the State and the growers" will collectively refer to the Defendant and Intervenor Appellants. Throughout the course of this litigation, the defendants and the intervenors have asserted the same positions. As the record reveals, the grower-intervenors assumed the burden of the defense at trial.

A. The State and Private Parties Have Steadily Responded to UFW Activities in Arizona By Enforcing the AERA Against the Union, its Members, and Supporters.

Since passage of the AERA, the State of Arizona and private parties have established a history of enforcement of the Act against the UFW, its farmworker members and public supporters through civil suits and administrative proceedings. The undisputed enforcement, here downplayed by the State, belies Appellants' claim that the Union's challenge to the Statute is somehow "hypothetical." From the facts emerges "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality," necessitating federal court intervention. *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273 (1941).

As the Enforcement Stipulation[76] details, both the State and numerous private litigants have sought and obtained enforcement of sections of the Act and, on several occasions, the Act's entire union unfair labor practice provision, Section 1385(B), to restrain UFW strike and boycott activities. Safeway Stores filed a suit to halt UFW publicity

[75]Brief for the Appellants, at 15.

[76]A. 79-191; *see, supra*, fn. 9.

informing the public about its labor dispute with grape and lettuce growers, alleging violation of every union unfair labor practice contained in Section 1385(B).[77] After the superior court reviewed the Union's conduct under Section 1385(B), granting injunctive relief under certain of its subsections and finding one, subsection (B)(7) unconstitutionally vague,[78] the AERB initiated a prosecution based on the very same conduct, alleging violation of subsections (B)(6), (7), and (8).[79] Since the Safeway suit, other liquor distributors, suing to enjoin the UFW's publication of its dispute with Gallo and other wine companies, have also alleged violation of Section 1385(B) in its entirety against the UFW.[80]

The Union has also been charged with violation of specific subsections of 1385(B). Notably, the AERB refused to consider the UFW's defense that subsections (B)(6) and (7) were unconstitutional in its prosecution of charges filed by five liquor retailers against the Union and its supporters for boycott activities.[81] Yet the AERB applied to the superior court for injunctive relief on behalf of the same five liquor retailers based on the same charges, without notifying the Union, and obtained an order broadly prohibiting all communication with store managers about the Union's boycott under (B)(7),[82] which had been the subject of the UFW's motion to dismiss before the Board

[77]Enforcement Stipulation, at Item 2; A. 80-82, 97.
[78]*Id.*, at Item 2A; A. 80, 93-105.
[79]*Id.*, at Item 2F; A.81.
[80]*Id.*, at Items 7 and 13; A. 84, 88.
[81]*Id.*, at Item 11; A. 85.
[82]*Id.*, at Item 12; A. 87; Appendix D.

and which two years earlier in the Safeway case had been held unconstitutional on its face by another superior court.

Subsection (B)(10) was also utilized against the UFW and its members to halt picketing and strike activities at D'Arrigo Brothers, a lettuce producer.[83]

Further, the AERB and private parties obtained several of these temporary injunctions to restrain UFW boycott and strike activities by invoking provisions of the AERA which authorize temporary relief without notice. Two such temporary orders, obtained by private liquor retailers without notice to the UFW, were later dismissed on such grounds as insufficient evidence, lack of standing, and improper service, the plaintiffs having achieved restraint of speech and conduct protected by the First Amendment prior to a hearing by their *ex parte* application.[84] Another injunction without notice was secured by the AERB. Without affording the UFW an opportunity to be heard, the Board sought enforcement of Section 1385(B)(7), and obtained the injunction mentioned above banning all communication with store management personnel pertaining to the boycotted product.[85]

Based on the Enforcement Stipulation setting forth the various enforcement proceedings against the UFW, the District Court correctly concluded that "this case is not hypothetical, abstract, or generalized."[86]

In addition, unrebutted testimony at trial established the AERA's tangible injury to the Union through its loss

[83]*Id.*, at Item 1; A. 79-80.
[84]*Id.*, at Items 7 and 13; A. 84, 88.
[85]*Id.*, at Item 12; A. 87; Appendix D.
[86]A. 463.

of collective bargaining agreements,[87] membership,[88] organizational support among Arizona farmworkers,[89] and boycott support,[90] as well as legal costs to defend enforcement actions.[91]

The State and the growers studiously ignore the substantial history of actual enforcement of the AERA against the UFW, in a conspicuous reversal of the growers' factual allegations in their Motion and Application to Intervene as Defendants.[92] There, describing their interest in the District Court action, the grower-appellants allege:

> Essentially, there are two organized groups involved in the labor disputes since passage of the Act—the United Farm Workers Union and the agricultural producers represented by the intervenor-applicants associations. Where the validity of the entire Act is challenged by one of the two contending parties, it is important that the legal perspective of the other contending party be considered.[93]

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[87] A. 399-400.

[88] *Id.*

[89] A. 399.

[90] A. 398.

[91] R. 267.

[92] Motion, *supra*, n. 4, at 4, ¶ III(f).

[93] *Id.*, at 4, ¶ III(f).

The growers also alleged, as an important interest, a view of the Act, as it may be applied, as an integrated whole.

> The Arizona Agricultural Employment Relations Act, A.R.S. § 23-1389-1395, is a comprehensive act, specifically designed to totally regulate agricultural employees and employers in the field of labor relations. Numerous protections are afforded those employers represented by the intervenor-applicants via this Agricultural Employment Relations Act. These protections include in part, sanction against unfair labor practices, restrictions on strike and boycott activities, procedures for resolving issues of representation, and criminal sanctions in the Act which provide numerous and important protections for the members of the intervenor-applicants. Inasmuch as this suit attempts to declare the Arizona Agricultural Employment Relations Act unconstitutional, this lawsuit has a direct and pecuniary effect upon the interest of the intervenor-applicants . . . *Id.*, at 3, ¶ III(a).

Now, to minimize the same extensive enforcement which prompted the growers to assume the burden of the defense in this case, they disconnect the pattern of Board and private enforcement of the Act and fragment the "comprehensive, multi-faceted statute," walking a narrow semantic tightrope to urge that the fragmentary portions may be dissociated from the actual adversary clashes between the principal "contending parties," the UFW and the growers.[94] Their narrow position is untenable; the considerable extent of past enforcement of the AERA against the UFW does not permit such a constrained analysis. Moreover, the type of injury suffered by the UFW—restraint without notice, the necessity of defending against repetitious litigation and broad limitations on fundamental rights, loss of contracts, membership, and support—can only be attributed to the Act as a whole. The ample history of enforcement of the AERA against the UFW unquestionably satisfies the justiciability requirements of Article III.

The State's view of the AERA and its operation as a collection of disconnected fragments also fails to overcome the weighty presumption against severability of the Act's provisions. As the State and growers readily admit, the AERA is a comprehensive regulatory scheme designed to govern the field of farm labor relations in a total, integrated manner.[95] The Act's Declaration of Policy, Section 1381, makes clear that the election procedures, collective

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[94] *See*, Brief for the Appellants, at 34-35.

[95] Brief for the Appellants, at 15; *see also*, fn. 93, *supra*.

bargaining provisions, unfair labor practices, particularly those restricting boycott activities, and enforcement provisions are all essential to the regulatory balance struck by the Arizona Legislature. Plainly, from a reading of the Act, operation of the various provisions presumes the existence of the others. In such a case, where statutory provisions "are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently," then, upon a finding some of the provisions unconstitutional, the entire statute must fall. *Pollack v. Farmers Loan & Trust Co.*, 158 U.S. 601, 636 (1895).

The AERA's lack of a severability clause underscores the statute's integrated character. The absence of such a clause gives rise to a presumption that the Legislature intended it be effective as an unmutilated whole. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936). And even where a severability clause appears, the Court will refuse to honor it if the result "would be to create a program quite different from the one the legislature actually adopted." *Sloan v. Lemon*, 413 U.S. 825, 834 (1973); *see also, Meek v. Pittinger*, 421 U.S. 349 (1975). That the Arizona Legislature departed from the model of the NLRA, which does contain a severability clause,[96] conclusively establishes its intent that the AERA operate with *all* of its

[96]29 U.S.C. § 166.

provisions intact. Thus, the constitutional defects in the challenged provisions of the AERA invalidate the entire Act.

Balancing on the same semantic tightrope, the State claims the Appellees lack standing to allege a justiciable controversy. It argues that no harm to any specific individual has been shown, nor a showing made that any possibly harmed individual could not bring suit.[97] Again, such a strained view of the Act, of the "contending parties" regulated by it, and of the pattern of enforcement broadly touching virtually every aspect of the Union's activities does not find support in the well-settled doctrine of standing.

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. Baker v. Carr, 369 U.S. 186 (1962). (*Warth v. Seldin*, 422 U.S. 490, 499 (1975).)

"Personal stake" in the outcome of a controversy sufficient to confer standing to challenge a regulatory statute exists when the challenger is "within the zone of interests protected by the Act" (*Barlow v. Collins*, 397 U.S. 159, 164

[97]Brief for the Appellants, at 33-34.

(1970)) or when the plaintiff has suffered "injury in fact, economic or otherwise." *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 152 (1970). In short, standing is embodied in an action between the logical parties to adjudicate the statute's validity with the necessary degree of contentiousness, imparting the justiciability necessary to a case or controversy under Article III. *Flast v. Cohen,* 392 U.S. 83, 102 (1968); *Golden v. Zwickler,* 394 U.S. 103 (1969). In *Barlow v. Collins, supra,* this Court found tenant-farmer participants in a cotton program possessed a sufficient "personal stake" to attack a regulation which made rent for land used to grow a crop subject to assignment of advance subsidies under the program. This Court found the tenant farmers injured before the regulation's enforcement, upon their allegation that the regulation would deprive them of bargaining power they might otherwise gain by using advance subsidies to attain financial independence. The Act under which the regulation was promulgated specifically governed tenant farmers, giving plaintiffs the "personal stake" sufficient to impart justiciability to their claim.

By these standards, the UFW and its agents, members, and supporters have standing to challenge the AERA. They fall squarely within the specific regulatory ambit of the Act, have all been directly and severely injured by steady enforcement of the Act against them since its passage, and are precisely the parties to challenge the Act with the necessary interest. Moreover, this Court has recognized a union's standing to raise any claim that a member has standing to raise, since a union acts only through its members. *Allee v. Medrano,* 416 U.S. 802, 819, n. 13 (1974);

see also, N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); *Carey v. Population Services International,* 431 U.S. 678 (1977). Not only does the record in this case establish the UFW's actual injury from the operation of the AERA, but recounts numerous instances of restraint of its members and supporters' constitutionally-protected conduct, also conferring standing on the Union. The State and growers' claim of lack of standing conflicts with the growers' acknowledgment that they and the UFW have been the principal combatants under the AERA since its passage[98] and ignores principles established by this Court under Article III.

B. The AERA Presents an Existing Threat of Enforcement and Thus States a Case or Controversy Under Article III.

Article III's case or controversy requirement does not limit federal jurisdiction to cases of direct injury; a justiciable controversy arises from threatened enforcement as well. The enactment of the AERA mandates its enforcement. No matter how minutely the growers and the State fragment the Act nor how minimally they characterize past enforcement, they cannot eradicate the obvious threat of enforcement.

This Court has consistently recognized that a challenge to a penal statute affecting the exercise of constitutional rights states a justiciable controversy in advance of any actual prosecution. A facial challenge on First Amendment overbreadth or vagueness grounds further heightens the personal stake, immediacy, and necessity for judicial reso-

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[98] *See, supra,* text accompanying fn. 93.

lution for the very existence of a statute which sweeps too broadly in areas protected by the First Amendment creates a pervasive chill on the exercise of precious rights.

> Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. (*Thornhill v. Alabama,* 310 U.S. 88, 98 (1940).)

See also, Baggett v. Bullitt, 377 U.S. 360 (1964). Anticipatory or preventive challenges of such statutes have long been recognized. *Doe v. Bolton, supra,* 410 U.S. 179; *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Allee v. Medrano, supra,* 416 U.S. 802; *Epperson v. Arkansas,* 393 U.S. 97 (1968).

In *Doe v. Bolton, supra,* physicians challenged a state criminal statute regulating abortion. Even though not one of the physician-plaintiffs had been prosecuted or threatened with prosecution under the statute, this Court recognized a "sufficiently direct threat of personal detriment" in the express application of the criminal provisions to physicians and the logical expectation of a newly-enacted statute's enforcement. *Id.*, 410 U.S. at 189. Because, by practicing their profession, the plaintiff-physicians risked violation of the statute, the potential for enforcement was not "chimerical." *Poe v. Ullman,* 367 U.S. 497, 508 (1961). This Court understandably rejected requiring plaintiffs to expose themselves to arrest or prosecution as a prerequisite for challenging the statute's infringement of the constitutional rights of the physicians' patients.

The AERA is a criminal statute regulating the exercise of First Amendment rights of speech and association. Consciously departing from the NLRA,[99] the Arizona legislature inserted Section 1392, which mandates a fine of not more than five thousand dollars, imprisonment for up to a year, or both for violation of *any* provision of the Act. By its terms, Section 1392 backs up the Act's regulation of every step of the collective bargaining process from organizing and selecting bargaining representatives to discussions at the bargaining table to public communication of the facts of labor disputes. The District Court held that Section 1392, along with other facially overbroad provisions of the AERA, " 'hangs over [people's] heads like a Sword of Damocles.' *Arnett v. Kennedy*, 416 U.S. 134 (1974)."[100] The State argues that "the only reason that the District Court was able to find a Damoclean effect at all"[101] is that it "consistently assumed the worst"[102] in reading the Act's provisions and argues that Section 1392 has not yet been enforced. Ironically, the State, charged with enforcing the legislature's mandate, thus asserts that the District Court erred in recognizing that the State might indeed carry out its duty. Such dubious claims cannot form the foundation upon which First Amendment guarantees rest.

The AERA is directed to appellees; the criminal penalties are plain on the face of the Act; and promulgation of this

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[99]The NLRA, as amended, contains no broad provision criminally penalizing unions or employers for engaging in activities governed by the Act's representation and unfair labor practice provisions. *See*, 29 U.S.C. § 150, *et seq.*

[100]A. 469.

[101]*Id.*

[102]*Id.*

comprehensive labor regulatory system necessarily contemplates comprehensive enforcement. Similar to the physicians' challenge in *Doe v. Bolton, supra*, 410 U.S. 179, appellees' facial challenge to the AERA presents a justiciable controversy, irrespective of the extent of enforcement or criminal prosecution.

Just as an actual controversy may exist without an actual criminal prosecution, a controversy under Article III may also exist without the necessity of incurring economic injury from the operation of an unconstitutional statute. In *Craig v. Boren, supra*, 429 U.S. 190, this Court held that plaintiff beer vendor could not be forced to choose in advance between "direct economic injury through the constriction of her buyers' market" under statutes discriminatorily prohibiting sale of 3.2% beer to men under 21 and to women under 18 and possible loss of her license for disobeying the legal duties created by the statutory sections. Rejecting defendants' Article III challenge, this Court stated, "[C]ertainly, no suggestion will be heard that [petitioner's] anticipatory challenge offends the normal requirements governing such action." *Id.*, at 196, n. 5. This Court also unanimously approved a challenge to an ordinance prohibiting posting of "For Sale" and "Sold" placards even though the property in question had been sold during the litigation, finding an "immediate prospect" that the petitioning realtor would desire to place such signs on other property in the township. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). *See also, Carey v. Population Services International, supra*, 431 U.S. 678; *Nyquist v. Mauclet*, 432 U.S. 1, n. 7 (1977); *Epperson v. Arkansas, supra*, 393 U.S. 97.

The threat of administrative or judicial enforcement posed by Arizona grower-appellants adds substantiality and clarity to the controversy presented to this Court. The growers have an obvious interest in invoking the AERA's regulatory mechanism to curtail union activities among their employees. Unlike the cases above where prosecution or economic detriment depended solely upon the initiative of the State, the AERA's enforcement provisions can be invoked by private parties. As the Enforcement Stipulation reflects, private parties have sought and obtained administrative and injunctive relief, on occasions without notice, against the UFW under provisions held unconstitutional by the District Court and challenged by appellees. Similarly, the Act's unconstitutionally burdensome and workable election procedures, which mock the Act's promise of organizational freedom, place the Union in the same position as the beer vendor in *Craig v. Boren, supra*, 429 U.S. 190, and the realtor in *Linmark Associates, Inc. v. Township of Willingboro, supra*, 431 U.S. 85. To avoid application of the unconstitutional Arizona statute, the Union must forego activities which constitute its *raison d'etre*. As the Court succinctly stated in *Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102, 143 (1974),

> Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect. (Citations). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pennsylvania v. West Virginia*, 262 U.S., at 593.

The threat of criminal prosecution or economic injury from operation of unconstitutional provisions of the AERA is even more concrete in this case than in the anticipatory challenges approved by this Court, for the past enforcement of the Act portends future enforcement. An *ex parte* injunction obtained without notice to the Union restraining all speech to store managers does not present a hypothetical enforcement of the Act. Such an injunction has been issued against the UFW.[103] That the Act's election procedures do not facilitate elections is documented by the Enforcement Stipulation.[104] The State's essential case or controversy argument—that the AERA has not been enforced *enough* against the UFW, its farmworker members, and its supporters—exhibits a narrow and subjective view of Article III which this Court has never approached. The Act's past enforcement is the most powerful proof of the threat of continued enforcement.[105]

The State's claim that the Court does not review comprehensive regulatory statutes in advance of their appli-

[103]Enforcement Stipulation, at Item 12; A. 87; Appendix D.

[104]*Id.*, at Items 4, 5, 6, 8, 9, and 10; A. 82-85.

[105]That the AERA has not been enforced to a greater extent does not minimize the threat of future enforcement. Even abandonment of union organizing under an unconstitutional statute will not eliminate a live controversy under Article III. Rather, such cessation may itself constitute injury sufficient to keep the controversy alive. When the union pursued precisely this course in *Allee v. Medrano, supra,* 416 U.S. at 810-11, the Court held:

> We may not assume that because during this period they directed their efforts to the judicial battle, they have abandoned their principal cause. Rather, the very purpose of the suit was to seek protection of the federal court so that the efforts at unionization could be renewed . . . The appellee Union remains very much a live organization and its goal continues to be the unionization of farmworkers. The essential controversy is therefore not moot, but very much alive.

cation is similarly meritless. In the companion case of *Doe v. Bolton, supra,* 410 U.S. 179 (1973) and *Roe v. Wade,* 410 U.S. 113 (1973), this Court set forth constitutional guidelines for state abortion laws. In *Baker v. Carr,* 369 U.S. 186 (1962), the Court considered a challenge to a state apportionment statute, directing:

> When challenges to state action respecting matters of "the administration of the affairs of the State and the officers through whom they are conducted" have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim. (*Id.*, at 229.)
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> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. [*Colgrove v. Green*] 364 U.S. at 347, 81 S.Ct. at 130." (*Id.*, at 231).

Other examples include *South Carolina v. Katzenbach,* 383 U.S. 301 (1966) and *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923).[106]

[106]The State relies principally on three cases to support its blanket assertion that the Court will decline, as a matter of course, to review comprehensive state legislation in advance of application, *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945); *American Federation of Labor v. Watson,* 327 U.S. 582 (1946); and *Broadrick v. Oklahoma,* 413 U.S. 601 (1973).

In *McAdory,* plaintiff unions did not challenge the state statute's express requirement that labor unions functioning in the State file reports but alleged that failure to file would infringe their rights to continue functioning. The Court, noting a state court holding that the statute did not authorize the granting or withholding of a license to a union, found that the statute's criminal penalty, which it upheld, applied to failure to file a report alone and nowhere further restrained the union's functioning. Thus, the Court held that

Any blanket argument that this Court will not review a regulatory program must be discarded as illogical. The existence of serious constitutional infirmities interacting in an integrated regulatory statute, in fact, compels review under the principles of federalism. See, *Steffel v. Thompson, supra,* 415 U.S. at 473-74.

C. Appellees' Challenge to the AERA on Facial Overbreadth Grounds Meets the Requirements of a Justiciable Controversy.

Relying exclusively on *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the State argues that this case is not "appropriate"[107] for application of the overbreadth doctrine, claiming that the alleged overbreadth of the statute is not

until it was presented with a case showing the statute applied other than as written, there was no case or controversy.

By contrast, the UFW contends that the AERA, on its face, directly abridges associational and speech guarantees both by the terms of specific sections and by the all-enveloping criminal sanctions.

In *Watson*, the Court abstained under the *Pullman* doctrine (*see, infra,* Part II) to allow the state courts to determine whether the challenged right to work provision was self-executing and in what manner. Before doing so, however, the Court found that plaintiffs had alleged a substantial controversy and irreparable injury. Under *Pullman* abstention, of course, the federal court retains jurisdiction of the controversy pending state decision.

In *Broadrick*, the Court was presented with a challenge to only two sections of a comprehensive state statute regulating partisan political activity of state employees, and it considered both sections. The Court rejected the overbreadth challenge to the two provisions on the ground that plaintiffs' conduct not only flagrantly violated them both but also unquestionably fell outside First Amendment protection. Therefore, plaintiffs had no standing to challenge the statute on overbreadth grounds. Unlike *Broadrick*, appellees here do not challenge the AERA from a basis of clearly unprotected activity; rather, appellees seek vindication of basic constitutional rights denied by the express language of the Act.

[107]Brief for the Appellants, at 35.

"real and substantial" because the criminal provisions have not yet been enforced.[108] *Broadrick*, however, solidly affirms appellees' challenge to the Act on facial overbreadth grounds.

In *Broadrick*, this Court summarized that facial overbreadth claims are limited to statutes which, by their terms, seek to regulate only spoken words; rights of association; time, place, and manner of expressive or communicative conduct; and standardless discretionary power resulting in virtually unreviewable prior restraints on First Amendment rights. *Id.*, 413 U.S. at 612-13. As the regulatory scope of the challenged statute moves from the above four categories to that of ordinary criminal statutes, the requirement that the overbreadth be "real and substantial" before the statute may be challenged comes into play. *Id.*, at 615-16.

The AERA, by its terms, regulates associational conduct. Additionally, the Act proscribes peaceful discussion with store managers;[109] limits the truthful content of speech to consumers in the context of a primary boycott;[110] and places time, place, and manner restrictions on communications with workers.[111] The Act's broad prohibitions are further cemented by penal sanctions[112] and the availability of *ex parte* temporary restraint without notice.[113] By its express terms, the AERA imposes stringent regulation under *Broadrick's* four categories on associational rights; pure

[108]*Id.*, at 36-37.

[109]§ 1385(B)(7); *see,* discussion, Part V, *infra.*

[110]§ 1385(B)(8); *see,* discussion, Part IV, *infra.*

[111]§ 1385(C); *see,* discussion, Part VIII, *infra.*

[112]§ 1392; *see,* discussion, Part X, *infra.*

[113]§§ 1390(K), 1393(A), 1393(B); *see,* discussion, Part III, *infra.*

speech; time, place, and manner of communicative and expressive conduct; and it allows private parties, as well as local officials, discretion to impose prior restraints on threatened activity protected by the First Amendment. As a statute of specific regulatory scope, then, the AERA is plainly overbroad on its face, and appellees state a justiciable controversy by their challenge, without respect to actual enforcement against the Union.

Moreover, the AERA's overbreadth is "real and substantial." The deterrent effect of an overbroad statute has been found both real and substantial where, to avoid operation of the statute, the person regulated must either restrict constitutionally-protected activity or take steps which are "expensive or even physically impracticable." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975). To avoid operation of the AERA, the UFW must restrict speech and associational activities protected by the First Amendment; no steps, economic or physical, short of such restriction are available. The challenged overbreadth in this case is, therefore, both real and substantial.

Appellees present a justiciable controversy to this Court, based on a history of actual enforcement of the AERA against the UFW, on the practical threat of enforcement implicit in the recent promulgation of the Act and its specific application to appellees, and on the Act's facially overbroad infringement of First Amendment rights. The State's deliberate disregard of its own enforcement of the AERA, its efforts to fragment the regulatory impact of the Act's provisions, and its strait jacketed view of the case or controversy requirement of Article III all must be

rejected out of hand. Appellees' challenge compels the exercise of federal jurisdiction.

II.

APPLICATION OF THE DISCRETIONARY DOCTRINE OF ABSTENTION IS INAPPROPRIATE IN THIS CASE SINCE THE CHALLENGE TO THE AERA DOES NOT REST ON UNCERTAIN QUESTIONS OF STATE LAW AND ABSTENTION WOULD RESULT IN INORDINATE DELAY, EXPENSE AND DEPRIVATION OF CONSTITUTIONAL RIGHTS.

The State argues that deferring the complex issues raised in this appeal to state court resolution under the *Pullman*[114] doctrine will eliminate the AERA's constitutional infirmities as state courts interpret and administer the statute. Abstaining in this case, however, will merely side-step substantial constitutional issues, only to see their return to this Court greatly exacerbated, after long delays, and in piece-meal fashion.

By its nature, *Pullman* abstention inevitably occasions delay and the consequent danger that valuable federal rights will be lost without expeditious adjudication in the federal courts. Hence, the Court will abstain only in "special circumstances" and only upon careful consideration of the facts of each case. *Kusper v. Pontikes,* 414 U.S. 51, 55 (1973); *Zwickler v. Koota, supra,* 389 U.S. at 248; *Baggett v. Bullitt, supra,* 377 U.S. 360, 375-79; *Railroad Comm'n v. Pullman, supra,* 312 U.S. at 500.

Where, as here, a statute is attacked as facially violative of the First Amendment, "to force the plaintiff who has

[114] *Railroad Comm'n of Texas v. Pullman Co., supra,* 312 U.S. 496.

commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler v. Koota, supra,* 389 U.S. at 252. As the Court observed in *Baggett v. Bullitt, supra,* 377 U.S. at 378-79:

> We also cannot ignore that abstention operates to require piecemeal adjudication in many courts, . . . thereby delaying ultimate adjudication on the merits for an undue length of time . . , a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms . . . where the vagueness of the statute deters constitutionally protected conduct, "the free dissemination of ideas may be the loser." *Smith v. California,* 361 U.S. 147, 151, 80 S.Ct. 215, 218.

Following these principles, federal courts do not abstain often, nor lightly. When they do, the issues upon which federal claims are premised involve a narrow, uncertain state law question peculiarly within the province of the local courts (*Reetz v. Bozanich,* 397 U.S. 82 (1970); *Fornaris v. Ridge Tool Co.,* 400 U.S. 41 (1970)), and "obviously susceptible" of a construction which will eliminate or substantially change the federal question and capable of resolution in a single, swift state proceeding. *Zwickler v. Koota, supra,* 389 U.S. at 251, n. 14; *see also, Steffel v. Thompson, supra,* 415 U.S. 452; *Harman v. Forssenius,* 380 U.S. 528, 534 (1965).

However, where resolution of the state law question would not significantly affect the federal claim (*Chicago v. Atchison, T. & S.F. Ry. Co.,* 357 U.S. 77 (1958); *Public*

Utilities Comm'n v. United Fuel Gas Co., 317 U.S. 456, 462-63 (1943)) or where, even in the instance of a narrow issue of underlying state law, the litigation has been long delayed (*Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 329 (1964)), this Court has held abstention inappropriate.

When a federal court exercises its discretion to abstain under *Pullman,* it retains jurisdiction of the case pending resolution of the state law question. In its most recent cases, the Court has evinced particular concern with the delay and expense inherent in applying the *Pullman* doctrine and has relied heavily on state rules permitting direct certification of state law questions to a state appellate court for prompt clarification.[115]

Thus, *Pullman* abstention involves both a *substantive* inquiry as to whether narrow, uncertain local law questions, obviously susceptible to a construction which will obviate constitutional determinations underlie the federal claims and a *practical* inquiry into the feasibility of a prompt state resolution. In the instant case, the obvious federal claims based on the face of the statute, as well as

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[115] In *Bellotti v. Baird,* 428 U.S. 132, 150-51 (1976), the Court held:

> This Court often has remarked that the equitable practice of abstention is limited by considerations of "the delay and expense to which application of the abstention doctrine inevitably gives rise." [Citation.] As we have also noted, however, the availability of an adequate certification procedure "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." Lehman Brothers v. Schein, 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215, 220 (1974).
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> [T]he availability of certification greatly simplifies the [*Pullman* abstention] analysis.

Accord, *Elkins v. Moreno,* 435 U.S. 647, 662, n. 15 (1978).

the practical procedural cost of abstention, unquestionably militate against remitting the parties to state courts only to have them return years hence in piece-meal contexts, all involving precisely the same constitutional issues presently before this Court.

A. Appellees' Challenge to the AERA Does Not Raise Narrow, Uncertain State Law Questions, Rather, It Focuses On Basic And Pervasive Federal Constitutional Defects.

Substantively, the State endeavors to formulate hypotheticals which it urges are susceptible to construction by Arizona courts to avoid or lessen the impact of constitutionally objectionable portions of the Act. Its hypotheticals joust Quixotically at the fringes of the statute, falling far short of the deep-seated and pervasive constitutional weaknesses of the Act. The AERA is constitutionally infirm on its face; it does not require the Court to "forecast" narrow, uncertain questions of local law. *Railroad Comm'n v. Pullman, supra,* 312 U.S. at 499. Underneath the superficiality of its examples, the state asks this Court to abstain so that Arizona courts may have an opportunity to resolve what are obviously, at base, federal constitutional questions. The abstention doctrine does not, however, require that a federal court stay its hand in order to allow state courts first to apply federal constitutional principles to save unconstitutional state statutes. *Procunier v. Martinez,* 416 U.S. 396, 400-01 (1974); *Zwickler v. Koota, supra,* 389 U.S. at 251; *Wisconsin v. Constantineau,* 400 U.S. 433, 439 (1971). As the Court held in *England v. Louisiana State Board of Medical Examiners, supra,* 375 U.S. at 415-16:

> Abstention is a judge-fashioned vehicle for according appropriate deference to the "respective competence of the state and federal court systems." Louisiana P. & L. Co. v. Thibodaux, 360 U.S. 25, 29, 79 S.Ct. 1070, 1073, 3 L.Ed.2d 1058. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law. Accordingly, we have on several occasions explicitly recognized that abstention "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise." [Citations.]

Remitting the Union and its members to state court would only cause the same constitutional questions to be brought in the same form at the state level and eventually to find their way to this Court again for review. Application of state statutory law will neither obviate nor materially change the necessary constitutional determinations.

The State also curiously seeks refuge in the number of challenged constitutional defects, contending thereby that the AERA must somehow involve some uncertain questions of state law. It points to no concrete bases in state law which would provide the logic missing from its argument. Rather than imply that some unspecified state construction will save the statute, the sheer number of constitutional infirmities compels immediate consideration of the merits by this Court to avoid the long delay and inhibition of constitutional rights which abstention will cause. As to the

Union's challenges of various provisions regulating its organizing and collective bargaining activities, this Court has held that constitutionally vague statutes, open to infinite interpretations and incapable of limitation without extensive adjudications, do not first call for state narrowing interpretations. *Baggett v. Bullitt, supra,* 377 U.S. at 376-78. In a recent application of this principle, a constitutional attack on state regulations governing censorship of prisoner's mail, the Court explained:

> In *Baggett* the Court considered the constitutionality of loyalty oaths required of certain state employees as a condition of employment. For the purpose of applying the doctrine of abstention the Court distinguished between two kinds of vagueness attacks. Where the case turns on the applicability of a state statute or regulation to a particular person or a defined course of conduct, resolution of the unsettled question of state law may eliminate any need for constitutional adjudication. 377 U.S., at 376-377, 84 S.Ct., at 1325-1326. Abstention is therefore appropriate. Where, however, as in this case, the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague terms, abstention is not required. Id., at 378, 84 S.Ct., at 1326. In such a case no single adjudication by a state court could eliminate the constitutional difficulty. Rather it would require "extensive adjudications, under the impact of a variety of factual situations," to bring the challenged statute or regulation "within the bounds of permissible constitutional certainty." Ibid. (*Procunier v. Martinez, supra,* 416 U.S. at 401, n. 5.)

Any court examining the AERA must face the patent constitutional defects in its provisions. The State does not contest the basic constitutional nature of the inquiry into the Act's prohibitions on the right to strike and boycott, its limitations on content of speech, its extensive disenfranchisement of workers in the exercise of the associational conduct of voting, its all encompassing penal and injunctive sanctions, and other provisions which, by their terms, have a certain and undisputed impact on rights to associate and to speak. Rather, Appellants' examples of questions avoidable by abstention reach out for peripheral issues into which they attempt to inject some uncertainty, in the end only highlighting the predominance of constitutional problems posed by the statute as a whole.

In its Jurisdictional Statement (at 20-21), the state argues that the term "calendar year" in Section 1382(1)[116] is uncertain. It provides no basis under Arizona law for this Court to conclude that if it abstains, forcing the delay and expense attendant on abstention, Arizona courts would not simply affirm that "calendar year" means January 1 through December 31. See, *Addison v. Holly Hill Fruit Products, Inc.,* 322 U.S. 607, 617-18 (1944). When the Arizona Legislature wanted to designate a year in less precise terms, it knew how to do so. *See,* Section 1385(B)(12)(b). In its brief on the merits, the state proffers an obscured

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[116]Section 1382(1) provides, in relevant part:

> "Agricultural employee, permanent" means any employee over sixteen years of age who has been employed by a particular agricultural employer for at least six months during the preceeding calendar year . . . "Agricultural employee, temporary" means any employee over sixteen years of age who has been employed by a particular agricultural employer and who has been so employed during the preceeding calendar year . . .

restatement of the same claim. Conceding that the District Court's reading of the plain language of Section 1382(1) to impose a successive employment requirement on the definition of "employee" has a "significant" impact on applying the AERA's election procedures to the seasonal migrant farmworker pattern, the State vaguely argues that the District Court should have abstained because the AERB could "treat the matter." Brief for the Appellants, at 39-40. The definition of "employee" under the Act unambiguously requires employment "during the preceding calendar year." The State suggests no way Arizona courts could "treat" this language to avoid its wholesale disenfranchisement of seasonal and migrant workers, without rewriting the statute; indeed, it cannot.

The other hypothetical upon which the State rests its argument for abstention as to the election procedures posits that, instead of the District Court's observation that general application of Arizona's Administrative Procedure Act would mean a twenty day period between the filing of an election petition and the pre-election hearing, abstention could result in a state court finding that the AERA's provision for "an appropriate hearing on due notice"[117] after a petition has been filed renders the Administrative Procedure Act inapplicable.[118] The District Court invalidated the AERA's election procedures because of their excessive length and permissible delays *as a whole*[119] and found, among other delays, that under the NLRA, which also contains a "hearing on due notice" requirement,[120] the pre-

[117]Section 1389(C).

[118]Brief for the Appellants, at 38-39.

[119]A. 482.

[120]29 U.S.C. § 159(c).

election hearing is not held until from fourteen to twenty-one days after the petition is filed.[121] The District Court based this factual finding solidly on expert testimony, testimony that would merely be repeated in a state court were this Court to abstain. Whether the Administrative Procedure Act applies to pre-election hearings or does not is immaterial to the District Court's conclusion that the Act's election procedures as applied to farmworkers are inherently unworkable and destructive of constitutional rights.[122]

Similarly, the State's plea to this Court to abstain as to the meaning of "facilities" in Section 1385(C) dissolves under analysis. Section 1385(C) affirmatively states that "No employer shall be required to furnish or make available to a labor organization . . . materials, information, time or facilities to enable such . . . labor organization . . . to communicate with employees of the employer, members of the labor organization, its supporters, or adherents." The District Court held that Section 1385(C) authorizes an employer to deny a union time *and* place for communi-

[121]A. 474.

[122]The State also hypothesizes that whether the AERA may be interpreted to allow or preclude the issuance of bargaining orders is an uncertain issue of state law meriting abstention. The District Court's discussion of bargaining orders in the context of the AERA (A. 475, 486-87) was not essential to its finding that the Act's election procedures, by their length and potential for delay, inhibit, rather than allow, freedom of association for collective bargaining purposes. The District Court simply observed that the Act's emphasis on secret ballot elections encourages employer interference with the election process for which there is no statutory remedy of an order to bargain.

Providing a bargaining order remedy for employer unfair labor practices which interfere with elections, however, would not cure the constitutional defect of the AERA's excessively long and delayable election procedures, for the Act's provisions allow an employer to use lawful conduct to delay the process, conduct which a bargaining order remedy could not reach.

cation with workers, and thus affirmatively infringes on First Amendment rights of speech and association.[123] The State, though attempting to inject uncertainty into the section's all-inclusive ban,[124] nowhere suggests that Arizona has a state law basis for interpreting this provision which would eliminate the need for constitutional adjudication. Abstention would merely defer consideration of an overridingly federal constitutional issue to the state courts, again improper abdication of federal responsibility. Moreover, any possible uncertainty raised by the statutory language exemplifies the type which the Court in *Baggett v. Bullitt, supra,* 377 U.S. 360, and *Procunier v. Martinez, supra,* 416 U.S. 396, defines as inappropriate for application of the abstention doctrine. To the extent that Section 1385 (C) has uncertain impact on associational rights under the AERA, no single adjudication by a state court could eliminate the constitutional difficulties and bring the provision within the limits of constitutional certainty.

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[123]A. 492-96. For discussion of the constitutional justification for ensuring effective communication, and hence access, to employees under the First Amendment, *see, infra,* Part VIII.

The State also attempts to cloud the District Court's conclusion that the compulsory arbitration portion of § 1393(B) denies Union due process. (Brief for the Appellants, at 42-43.) § 1393(B), one of several permitting summary relief, authorizes an employer to enjoin a strike for ten days if the employer agrees to submit the dispute to binding arbitration. The election of arbitration is unilaterally up to the employer; by its terms the provision does not allow the union to reject arbitration, nor does the statute permit a union to compel an employer to arbitrate.

The State does not argue precisely that § 1393(B) is uncertain; rather, it, incredibly, contends that a union "has no price to pay" (*Id.*, at 42) by the operation of § 1393(B). The "price" is the ability to strike, and if, as the state further asserts, "the effect of the restraining order is merely to bind the employer, not the union" (*Id.*, at 43), then the state implicitly acknowledges its certain impact.

For discussion of § 1393(B), *see, infra,* Part III.

[124]Brief for the Appellants, at 41.

The State's abstention argument as to the AERA's prohibition against "dishonest, untruthful and deceptive" consumer publicity[125] shows even more clearly the overwhelming predominance of purely constitutional issues. The State asks the Court to allow the Arizona courts the first opportunity to read into the Act the "knowing falsehood or reckless disregard" standard of *New York Times v. Sullivan,* 376 U.S. 254 (1964). In effect, it admits the statute's overbreadth and argues to defer the federal constitutional determination to the State. Without question, no state law issue is involved; the determination clearly falls within the proper jurisdiction of a federal court.

By its few hypotheticals raising fringe issues, the State skirts the inevitable confrontation between the AERA and the federal Constitution. It presents no state law issue obviously susceptible of a construction eliminating federal questions and capable of resolution in a single state proceeding to justify its assertion that the federal courts should abdicate their responsibility to decide the federal constitutional questions posed by this case.

B. Abstention Would Result In Inordinate Delay, Expense, And Deprivation Of Constitutional Rights To Appellees.

Procedurally, abstention in this case would entail limitless cost to the UFW, its members and supporters in time

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[125]§ 1385(B)(8) prohibits conduct by a labor organization

> [t]o induct or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity.

and expense, not to mention the deprivation of rights occasioned by the chill of living under an unconstitutional law as challenges slowly move through the state process and back to the federal courts. The Court in *England v. Louisiana State Board of Medical Examiners, supra,* 375 U.S. 411, graphically described the process once abstention is ordered. Abstention would force the Union to bring a declaratory judgment action in state court or to engage in constitutionally protected action and wait for the AERB or private parties to seek enforcement against it, one or several sections of the Act at a time. At that point, the Union would be required to elect to submit or to reserve its federal constitutional claims.

By submitting and fully litigating its federal claims at the state level, the Union could obtain federal review only by discretionary writ of certiorari in this Court after pursuing its claims through AERB and/or state court proceedings and on up the state appellate ladder, an ultimate resort which the Court in *England* itself termed "an inadequate substitute for the initial District Court determination" of federal claims and a denial of the "benefit of a federal trial court's rule in constructing a record and making fact findings" on federal claims. *Id.,* 375 U.S. at 416. *England* nonetheless expressly holds that "if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court." *Id.,* 375 U.S. at 419. Retention of jurisdiction by the District Court under the *Pullman* doctrine is thereby lost.

If, on the other hand, the Union elects to reserve federal constitutional claims, it must inform the state courts of the federal claims so that the state statute may be construed "in light of" those claims. *Government & Civic Employees Organizing Committee, C.I.O. v. Windsor,* 353 U.S. 364, 366 (1957). The Union must state on the record that it is exposing its federal claims only to this limited extent and intends to return to the District Court to litigate the federal issues should the decision on state law turn out unfavorably to it. This Court, in *England,* described some of the problems:

> . . . while a plaintiff who unreservedly litigates his federal claims in the state courts may thereby elect to forego his own right to return to the District Court, he cannot impair the corresponding right of the defendant.
>
> (375 U.S. at 422, n. 13.)

> The litigant denying the statute's applicability may be led not merely to state his federal constitutional claim but to argue it, for if he can persuade the state court that application of the statute to him would offend the Federal Constitution, he will ordinarily have persuaded it that the statute should not be construed as applicable to him. In addition, the parties cannot prevent the state court from rendering a decision on the federal question if it chooses to do so; and even if such a decision is not explicit, a holding that the statute is applicable may arguably imply, in view of the constitutional objections to such a construction, that the court considers the constitutional challenge to be without merit.
>
> (*Id.,* at 420-21.)

Thus, the litigant electing to reserve federal claims must proceed through the state courts with one arm tied behind his back, litigating state law questions while merely informing the court of federal questions casting light on the state law issues. In this case, where state law questions are at best hypothetical and federal constitutional questions on the face of the statute are the crux of the challenge, abstention amounts to proceeding through the state courts with *both* arms tied behind the litigant's back.[126]

Justice Douglas, concurring in *England,* cautioned additionally that application of the *Pullman* doctrine to the field of civil rights would place "[t]he whole weight of the *status quo* . . . on the side of delay and procrastination" (375 U.S. at 435), noting that individual litigants even in the normal abstention case have shuffled back and forth between federal and state courts for eight and ten year periods (*Id.,* at 425.) Even the majority termed the process full of "precedural traps" and pictured litigants "shunted" from federal to state courts. It is no small wonder that the Court has come recently to rely on state procedures for certification of federal questions, where such procedures exist, for application of the *Pullman* doctrine. Notably, Arizona lacks a certification procedure.

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[126]As one commentator aptly observed,

> The conclusion I would draw from all this is that Pullman abstention is not worth its costs. If some means of receiving state court input on unsettled issues of state law is deemed necessary, a certification procedure, under which a federal court that needs clarification of a state legal issue makes its inquiry directly to the supreme court of the state, seems vastly superior.

Field, *The Abstention Doctrine Today,* 125 U.Pa.L.Rev. 590, 605 (1977). Other commentators would abandon the doctrine altogether. Wright, *Federal Practice and Procedure,* Jurisdiction, § 4253, pp. 481-82.

Abstention in this case would cause a myriad of problems, for reservation of federal claims in the practical context of the challenge to the AERA again brings federal constitutional questions to the forefront. For example, the State, under the guise of abstention, asks this Court to allow state courts to imply the *Times Malice* standard into Section 1385(B)(8), conceding it to be a purely federal constitutional issue. The case might arise as have other AERA enforcement actions, with a store proprietor suing to restrain the content of primary boycott speech claimed to be untrue. Plaintiff store would argue that the speech was untrue and thereby violated the plain language of Section 1385(B)(8). Defending, the Union would be faced with an impossible choice. On the apparent strength of the argument that Section 1385(B)(8) offends the constitutional standard of *Times Malice* and in the hope of winning an immediate ruling approving the speech, the Union would be tempted to argue its federal claim. However, a loss of this claim would mean the instant inability to return to the federal court (which, up to that time, would have retained jurisdiction under *Pullman*). The Union would be forced to appeal through the state process on a record already containing adverse findings on a federal claim. On the other hand, reservation of the federal claim would require the Union to state the *Times Malice* standard but carefully refrain from arguing it, instead asserting firmly its intention to return to federal court. The Union's only possible non-constitutional argument then would be that the speech was in fact true, an issue irrelevant under the *Times Malice* standard and, as such, potentially undercutting reservation of its federal claim. Nothing, of

course, would prevent the plaintiff store from arguing its own constitutional view, or the state court from rendering a decision on the federal constitutional claim. If the Union loses in the state trial court, it again risks submission of the federal constitutional claim by filing an appeal, even if the appeal concerns the issue of truth of the contested speech. Meanwhile, the state court decision, reached in conjunction with the Union's urging not to decide constitutional questions, deters legitimate expression.

Adjudication of the AERA's access proscriptions is similarly problematic. A grower, seeking an injunction against entry by a union organizer onto his property for the purpose of visiting an employee who lives there in a company-owned house, would argue that the house is a "facility" under Section 1385(C) to which he need not "furnish" access. The grower would argue the broadest possible meaning for the term "facilities," contrary to the State and growers' position before this Court.[127] The Union, whose position in reality is that such a sweeping use of the term to prohibit clearly protected speech demonstrates the facial overbreadth of the section, would naturally be tempted to agree with the employer's broad reading of the term and to argue therein its unconstitutionality. To reserve its claims for federal court, however, the Union could merely state its overbreadth allegation. Then, it would be forced to argue the opposite, that "facilities" under state law narrowly does not include company-owned employee housing. Again, the prospect of appealing an incomplete position to which the Union does not adhere, reveals problems

[127]Brief for the Appellants, at 41.

inherent in abstention and acknowledged by the Court in *England*.

Even more difficult is reaching a final state determination under the AERA, whether federal claims are reserved or submitted. The AERA's procedural provisions create an inescapable morass of concurrent and sometimes conflicting jurisdiction of the Board and state courts. In 1973, in a suit filed by Safeway Stores against the UFW under the AERA, a state superior court held Section 1385(B)(7) unconstitutionally vague.[128] Shortly thereafter, the AERB, upon a charge filed by Safeway, proceeded against the UFW for the very same conduct, in part relying on Section 1385(B)(7)[129] and denying a UFW motion to dismiss based on the prior litigation of the same dispute.[130] To prevent this duplicate litigation, the UFW had to return to the state court for an injunction against the Board proceeding on the ground that the court had assumed jurisdiction and the matter was *res judicata*. The court held that the doctrine of concurrent jurisdiction prevented the Board from assuming jurisdiction over a dispute in which the court had already assumed "exclusive" jurisdiction.[131]

Then in 1975, the Board again proceeded against the Union under Section 1385(B)(7). The UFW, relying on the superior court determination, moved to dismiss on the basis of *stare decisis*. The administrative trial examiner denied the motion on the grounds that the Board had

[128]Enforcement Stipulation, at Item 2A; A. 80, 93-105.
[129]*Id.*, at Item 2F; A. 81-82.
[130]*Id.*; A. 163-68.
[131]*Id.*; A. 169-74.

primary jurisdiction and that the superior court determination was, therefore, not binding.[132] The administrative proceeding resulted in a decision in which the trial examiner, after having reserved jurisdiction to the Board, ruled that he did not have the "prerogative" to rule on constitutional questions in the administrative context.[133] On exceptions filed by the UFW, the Board, absolutely without explanation, not only held that it had no jurisdiction to consider the constitutional questions raised by Section 1385(B)(7), but "denied" that the superior court's determination in the Safeway case was *stare decisis*.[134] Ironically, under Section 1390(F), the state superior courts are charged with appellate review of the AERB's orders.

The AERA's procedural sections thus build a system of jurisdictional confusion. The Board may go to superior court for temporary restraint pending an unfair labor practice hearing;[135] it may also petition the superior court for enforcement of its orders;[136] and any person aggrieved may petition the superior court for review of Board orders.[137] In the case of enforcement or review, the superior court is empowered, in effect, to re-hear and re-decide the case by its liberal authority to consider additional evidence.[138] At the same time, any person aggrieved or injured in his business may sue for damages and injunctive

[132] *Id.*, at Item 11A; A. 85-86, 163-68.
[133] *Id.*, at Item 11C; A. 175-80.
[134] *Id.*, at Item 11D; A. 183-86.
[135] § 1390(J).
[136] § 1390(E).
[137] § 1390(F).
[138] § 1390(E).

relief for violation of any part of the Act.[139] This provision, quite plainly, authorizes duplicate litigation of any matter before the Board and the state courts.[140] In the actual enforcement of the Act, discussed above, this built-in double jeopardy, as it were, has resulted in rivalry as to which branch has exclusive jurisdiction, conflicting decisions, assumption of jurisdiction and then failure to exercise that jurisdiction on the merits, and refusal to apply well-settled legal doctrines designed to avoid duplicative and endless litigation without final result. If the Court abstains, it banishes the Appellees to a state labyrinth from which they, quite literally, may never emerge, whether they submit or reserve their federal claims.[141]

III.

THE AERA'S ENFORCEMENT PROVISIONS SANCTION THE ISSUANCE OF EX PARTE RESTRAINING ORDERS WITHOUT NOTICE IN THE AREA OF BASIC FREEDOMS GUARANTEED BY THE FIRST AMENDMENT AND MANDATE THE ISSUANCE OF AUTOMATIC RESTRAINTS ON STRIKES AND BOYCOTTS OR THREAT THEREOF WITHOUT PRIOR JUDICIAL HEARING IN VIOLATION OF THE FIRST AMENDMENT.

Sections 1393(A), 1393(B), and 1390(K) of the AERA all on their face provide for the issuance of restraining

[139] § 1393(A).
[140] Under federal labor law, duplicative jurisdiction is studiously prevented through the language of the LMRA, which allows suits only for violation of collective bargaining agreements [29 U.S.C. § 185] and for *damages* resulting from unlawful secondary boycott [29 U.S.C. § 187], and through the doctrines of preemption, exhaustion, and *res judicata*. § 1393(A) of the AERA consciously departs from the NLRA model and sets up a maze of inherently conflicting procedures for resolution of any dispute arising under the Act.
[141] "God helpe the man so wrapt in Errour's endlesse traine!" Edmund Spenser, *The Faerie Queene*, Book I, Canto I, ¶ XLIII, Dent & Dutton.

orders *ex parte* and without notice enjoining activities within the ambit of the First Amendment. Further, Section 1393(B) mandates an automatic restraining order against any strike, boycott, or threat of a strike or boycott. These enforcement provisions disregard the protections of First Amendment activities required by the Constitution.

A. Injunctions Issued Ex Parte And Without Notice.

Section 1393 in two separate subsections provides for restraining orders to issue pursuant to Rule 65 of the Arizona Rules of Civil Procedure, which does not require a party to notify an opposing party prior to obtaining temporary relief.[142] Arizona courts have affirmed that Rule 65 authorizes issuance of restraining orders without notice or prior hearing. *Nu-Tred Tire Company, Inc. v. Dunlop Tire and Rubber Corporation,* 118 Ariz. 417, 577 P.2d 268, 270 (1978). Arizona courts have on two occasions issued *ex parte* restraining orders against the UFW under Section 1393(A), and in both cases the orders issued without notice.[143]

In addition, Section 1390(K) authorizes the Board to obtain restraining orders without notice upon a petition alleging "that substantial and irreparable injury to the charging party will be unavoidable." The Board has obtained a restraining order against boycott activity by the UFW under this section, again without notice.[144]

Ex parte orders restraining activities of First Amendment concern are unconstitutional where issued without

[142]See Appendix "A", Rule 65(d).

[143]Enforcement Stipulation, at Items 7, 13; A. 84, 88.

[144]Enforcement Stipulation, at Item 12; A. 87.

notice, where there is no showing that it is impossible to serve or notify opposing parties and give them an opportunity to participate. *Carroll v. President and Commissioners of Princess Anne, supra,* 393 U.S. at 180. Notice is essential to allow participation of the opposing party in order to insure the careful judgment which must be exercised in any decision to restrain First Amendment activities and to tailor narrowly any such restraint. *Carroll; see also, United Farm Workers v. Superior Court,* 14 Cal.3d 902, 908-910, 122 Cal.Rptr. 877, 537 P.2d 1237 (1975). Section 1393 is not saved from this infirmity by Rule 65's provision for dissolution or modification of the restraining order on motion of the opposing party with two days' notice; a virtually identical provision was considered by this Court in *Carroll* and rejected because of the inherent inadequacy of such after-the-fact procedures. *Id.,* 393 U.S. at 184.

B. The Sweeping Nature Of The Automatic Prior Restraint Authorized By Section 1393(B).

Section 1393(B) requires the courts of Arizona to issue a ten-day restraining order upon the filing of a proper application by an agricultural employer.[145] The only issue before the court prior to issuing the restraining order is whether or not the verified petition contains the necessary allegations. "Proper application" includes only an allegation that the employees are unlawfully conducting a strike

[145]The statute reads, in pertinent part:

> In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application *shall* grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott . . . (emphasis added).

or a boycott or are unlawfully threatening to strike or boycott, and an allegation that the cessation of work or conduct of a boycott will result in the prevention of production or loss, or reduction in grade, quality, or marketability of an agricultural commodity for human consumption in commercial quantities.[146] If a strike is to be enjoined, an agricultural employer's petition must also include the employer's agreement to submit the dispute to binding arbitration.

Section 1393(B) allows no inquiry as to the objectives or the nature of the activities to be enjoined prior to the issuance of the relief.[147] In short, the statute mandates an automatic prohibition of First Amendment activity without a prior judicial hearing upon the validity of the grower's charges or a determination that the strike and/or boycott are in fact unlawful.[148]

This Court applies a heavy presumption against the constitutional validity of a system of prior restraints on expression. *Near v. Minnesota,* 283 U.S. 697 (1931); *Thomas v. Collins,* 323 U.S. 516 (1945); *Freedom v. Maryland,* 380 U.S. 51 (1965); *Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969). The activities regulated by

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[146]The statute equates "commercial quantities" with a market value of $5000 or more.

[147]The only discretion allowed to the court is that it "may" grant injunctive relief even where there is no "proper application".

[148]

> "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, supra,* 413 U.S. at 391.

Section 1393(B) come well within the ambit of First Amendment freedoms. Peaceful picketing, handbilling, and oral conversation are important means of communication, and as such, come within the First Amendment's guarantees of freedom of expression and assembly, fundamental liberties which extend to the States. *Thornhill v. Alabama, supra,* 310 U.S. 88; *Carlson v. California,* 310 U.S. 106 (1940); *A.F.L. v. Swing,* 312 U.S. 321 (1941). Boycott activities necessarily entail First Amendment concerns, as they inherently involve direct communication and speech by means of oral conversation, handbilling, newspaper advertisement, and peaceful picketing. Indeed, considered together, these fundamental activities of the boycott, picketing and the strike comprise the totality of a union's means of communicating the facts of a labor dispute to the public.

To be sure, conduct which combines speech and non-speech elements may be regulated by the State where the restrictions imposed are reasonably calculated and narrowly tailored to further substantial governmental interests. *United States v. O'Brien,* 391 U.S. 367, 376-77 (1968). However, where the government can further its interest by a lesser restraint on individual liberty at little or no added inconvenience, it must do so. *Shelton v. Tucker,* 364 U.S. 479 (1960); *United States v. Robel,* 389 U.S. 258, 267-68 (1967). Section 1393(B)'s sweeping restraint of strikes and boycotts, without any prior judicial determination of the objectives or the manner in which they are conducted, goes far beyond any legitimate interest of the State, and unconstitutionally infringes employee and union rights.

The various unfair labor practice provisions of the AERA which define "unlawful" strikes and boycotts are

discussed in separate sections of this Brief,[149] and in each case broadly restrict First Amendment activities. Section 1393(B) carries the constitutional infirmities of these sections a giant step further, granting an employer an automatic restraining order upon the mere allegation that a strike or boycott comes within one of these broad prohibitions. For example, an employer could allege that the oral conversation of a union supporter tended to induce or encourage a management employee to decide not to distribute a commodity, and on that basis enjoin a boycott. An employer could allege in its application for a restraining order that a strike was unlawful because it had not been properly authorized by a vote of a majority of the employees in the bargaining unit, as required by Section 1385(B)(13). Under Section 1393(B), this allegation would require the court to enjoin the strike, without permitting any inquiry into the validity of the allegation.[150] Similarly, an employer could allege that a union negotiator at the bargaining table had threatened to strike or boycott over a proposal possibly impinging on management rights, in violation of Section 1385(B)(11). Again, such an allegation entitles the employer to injunctive relief of a strike

[149]See Parts IV, V, VI, *infra*.

[150]Examination of § 1385(B)(13) reveals that it could be used to support an allegation of an unlawful strike in the case of literally every strike. The section specifically requires that the vote be by "secret ballot", and provides that voter eligibility be based on the bargaining unit, which under §§ 1382(1) and 1389(B) consists only of employees who worked for the employer in the previous year. These requirements leave room for an employer to allege a violation of the regulation, for purposes of obtaining a restraining order, in every case.

or boycott, without any inquiry into the union's actual bargaining table conduct.[151]

The impermissible feature of Section 1393(B) is the mandatory issuance of restraining orders obtained *ex parte* and without notice affecting the exercise of unquestionable First Amendment rights. Such a total and unqualified restraint on free expression has consistently been repudiated. *Thornhill v. Alabama, supra,* 310 U.S. 88; *Edwards v. South Carolina,* 372 U.S. 229 (1963).[152] The sweeping and automatic restraint authorized by the statute in every case is not narrowly tailored to any legitimate state interest.

The provision for binding arbitration of disputes contained in Section 1393(B) in no way relieves the statute's infirmities.[153] Section 1393(B) eliminates any effectiveness

[151]Another unfair labor practice section of the Act, not discussed elsewhere in this Brief, bears consideration in connection with § 1393(B). § 1385(B)(10) provides that it is an unfair labor practice for a union or its agents "to threaten or engage in arson, libel, slander, injury to person or property or other violent conduct when the objective is to prevent the preparing for market, transporting, handling, displaying for sale, or selling of any agricultural product." In prohibiting, *inter alia*, threats to engage in libel or slander, the statute provides a broad basis for employer allegations of unlawfulness based upon oral conversation. Thus, an employer could obtain a restraining order enjoining a boycott based upon an allegation that the union had threatened libel or slander, without any prior judicial determination of the validity of the allegations.

[152]See also, *Davis v. Francois,* 395 F.2d 730 (5th Cir., 1968); *Machesky v. Bizzell,* 414 F.2d 283 (5th Cir., 1969).

[153]The three judge court below on its own motion found the binding arbitration provision of § 1393(B) violative of substantive due process and the Seventh Amendment. The statute's facial invalidity on First Amendment grounds obviates these other concerns.

As this Court has recognized, a prevailing party may assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial

of a union's strike or boycott, without promoting peaceful accommodation of disputes between labor and management. Binding arbitration under Section 1393(B) may be invoked only by an employer, who can utilize it when desired. The employer is free to attempt to withstand the union economic pressure or to break a strike by hiring non-union workers, and if the strike or boycott threatens to be successful, he can resort to the Act to end the strike by agreeing to arbitrate. The employer is free to lockout his employees, creating as much disruption of production as the most effective of strikes, and the union has no means of compelling arbitration of the dispute.[154]

Further, the employer may invoke the restraint against a boycott without submitting to arbitration. The statute explicitly requires agreement to arbitration only where a strike is to be enjoined:

> If an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order *to enjoin a strike* as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. (Section 1393(B); emphasis added).

Thus, the automatic restraining order is available against the wide range of free speech activities inherent in a boycott, without any provision for alternative resolution of the dispute.

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court. *Dandridge v. Williams*, 397 U.S. 471, 476 (1970). Throughout these proceedings, Appellees have urged the invalidity of Section 1393(B) on First Amendment grounds.

[154]In addition, even in the event of a strike, the employer need not submit to arbitration if the restraining order is sought by a person other than the employer.

In addition, an employer with less than six employees may, under Section 1382(2), operate in complete freedom from any regulation under the AERA, yet has the option to elect to be an "agricultural employer" and obtain the automatic restraining order of Section 1393(B) at any time. In short, the statute is nothing more than a weapon given to employers to entirely prevent strikes and boycotts, with no relation to any legitimate state interest. As a prior restraint of activities within the ambit of First Amendment protections, the statute's provision for automatic across-the-board restraining orders is invalid.

IV.

SECTION 1385(B)(8) IMPOSES IMPERMISSIBLE CENSORSHIP ON ALL CONSUMER-DIRECTED SPEECH AND BANS WORKER COMMUNICATIONS ON ISSUES OF INDUSTRY-WIDE CONCERNS IN VIOLATION OF THE FIRST AMENDMENT.

At least since *Thornhill v. Alabama, supra*, 310 U.S. 88, First Amendment protections operate indisputably in the labor relations setting:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. [Citations.] . . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations such as are challenged here, infringing upon the right of employees effectively to inform the

> public of the facts of a labor dispute are part of this larger problem. . . . "Members of a union might, without special statutory authorization by a State, make known facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." (*Id.*, 310 U.S. at 102-03.)

Section 1385(B)(8), one of several provisions proscribing union consumer boycott activities,[155] blatantly infringes farmworkers' First Amendment speech rights recognized in *Thornhill*. This section defines as unlawful a labor union's or its members' conduct "induc[ing] or encourag[ing] the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural products by the use of *dishonest, untruthful* and *deceptive* publicity." [Emphasis added.] In addition to imposing a truth requirement on boycott speech, Section 1385(B)(8) limits permissible inducements to identifiable agricultural products produced by an employer "with whom the labor organization has a primary dispute." An agricultural employer who markets his product under a "trademark, trade name or generic name which would include agricultural products of another producer or user of such trademark, trade name or generic name" shields himself from any publicity directed to the consumer.

[155]The AERA regulates union boycott activities through numerous provisions, including § 1385(B)(6), § (B)(7) [*see*, Part V, *infra*], § (B)(8), and § (B)(12) [*see*, Part VI, *infra*]. Arizona's legitimate restriction of secondary boycott activity—i.e., activity directed at the *employees* of a secondary employer—is amply encompassed in § 1385(B)(6), which incorporates Arizona's existing secondary boycott restrictions in § 1321, set forth in Appendix C. The other boycott restrictions represent an obvious excursion beyond the restrictions of § 1321 to impose upon farmworkers restrictions deemed unnecessary for the rest of Arizona labor.

The District Court, in a detailed examination of Section 1385(B)(8), found it "invalid on its face." A. 492. This Section broadly restricts a labor organization's communications directed to the consuming public, whether by oral conversations, picketing, handbilling, or media communication to encourage a boycott of the struck product. Two fatal constitutional infirmities readily appear.

A. Unconstitutional Censorship.

The first infirmity is Section 1385(B)(8)'s mandate that all but "truthful, honest and nondeceptive" publicity to the consumer subjects a labor organization to summary prior restraint and criminal penalties.[156] For example, this Section would make unlawful and enjoinable union representations that:

> (1) An employer had the poorest working conditions in the state when the AERB or a superior court might decide that there were some worse.
>
> (2) An onion ranch employed child labor in its fields when in fact the legal employer was a labor contractor the ranch had retained to harvest its onions.

Section 1385(B)(8) also restricts expressions of opinion like "Unfair to Labor", hyperbole like "There's blood on those grapes", and other graphic language historically coloring this country's labor disputes. *See, Letter Carriers v. Austin*, 418 U.S. 264 (1974).

This Court traditionally invalidates such restrictions and regulations on speech not to encourage falsehoods, but to protect robust debate and to prevent government from

[156]§§ 1390(K); 1393(A) and (B).

assuming the robe of the censor. As employers and workers argue their respective cases to the public, the courts and the Board would be handed the overwhelmingly burdensome—if not impossible—task of establishing the accuracy of some claims while censoring others. The fact is that the First Amendment has always protected more than purely "true" speech. If it is made a crime to tell falsehoods, as this Act does, the speaking of truth is restricted as well.

In *Organization For A Better Austin v. Keefe, supra,* 402 U.S. 415, this Court reaffirmed this principle. In *Keefe,* a group protesting a realtor's "blockbusting" tactics distributed handbills exposing his practices. The realtor, contesting the "blockbusting" charge, obtained a court injunction against further leafletting. The injunction was invalidated, with the following pertinent language of Chief Justice Burger applicable here:

> It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v. Minnesota,* 283 U.S. 697, the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. (402 U.S. at 418.)

In *N.Y. Times v. Sullivan, supra,* 376 U.S. 254, this Court rejected any claim that First Amendment protections apply only to truthful statements:

> Authoritative interpretations of the First Amendment guarantees have *consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—*

> and especially one that puts the burden of proving truth on the speaker. Cf. *Speiser v. Randall,* 357 U.S. 513, 525-26, 2 L.Ed.2d 1460, 1472. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *N.A.A.C.P. v. Button,* 371 U.S. 415, 445, 9 L.Ed.2d 405, 425.
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> • • •
>
> That erroneous statement is inevitable in free debate and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need to survive" [citations] was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney v. Patterson* . . . . (376 U.S. at 271-72; emphasis added.)

A requirement which protects only truthful statements "dampens the vigor and limits the variety of public debate" and "is inconsistent with the First and Fourteenth Amendments." *Id.,* 376 U.S. at 279. Under a provision like Section 1385(B)(8), therefore, persons are frightened into not speaking at all for fear of making a statement that is not exactly accurate or one they are not prepared to prove in court. Some unknown fact could make their statements untrue and subject them to criminal prosecution. Under such a provision the safest course, but by no means the constitutional course, would be to say nothing.[157]

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[157]The State's analogy (Brief for the Appellants, at 62) of § 1385(B)(8) to § 8(b)(4)(ii)(B) of the NLRA (29 U.S.C. § 158(b)(4)(ii)(B)) requires little comment; the constitutional dimensions of the two provisions are entirely different. The proviso to § 8(b)(4) is *not* a prohibitory section, but strongly affirms conduct which is not, and constitutionally could not be, within the restrictive clauses of § 8(b)(4). The proviso *guarantees* protection for numerous means of union publicity and was, in fact, inserted as a safeguard of speech rights in labor disputes. *N.L.R.B. v. Fruit and Vegetable Packers [Tree Fruits],* 377 U.S. 58 (1964). No

The State does not seriously defend Section 1385(B)(8)'s imposition of a truth requirement on consumer-directed speech, suggesting instead the federal judiciary await state court determination of whether the *Times Malice* test limits the application of Section 1385(B)(8).[158] Not only does this position implicitly concede the overbreadth of Section 1385(B)(8), but it forces the Union and its members to act under the overhanging spectre of the State's application of an admittedly unconstitutional law.

The District Court recognized the error in the State's contention and correctly found Section 1385(B)(8) invalid. *See, Vanasco v. Schwartz*, 401 F.Supp. 87 (S.D.N.Y., 1975), *aff'd. without opin.*, 423 U.S. 1041 (1976). In *Vanasco*, the State of New York argued, just as the State and the growers do now, that the state courts should be given the opportunity to engraft the *Times Malice* limitation onto a statute which, on its face, incorporates no such limitation. However, the three-judge panel in *Vanasco* refused this suggestion, indicating "[n]o limiting construction has been applied to these sections and we cannot do so." *Id.*, 401 F.Supp. at 96-97. On similar reasoning, the District Court properly invalidated Section 1385(B)(8) by finding:

> The Court in *Vanasco* held that a statute prohibiting "deliberate misrepresentations" and regulations pro-

similar safeguards appear in the boycott provisions of the AERA. *See*, §§ 1385(B)(6)—(B)(10). Further, the word "truthfully" in § 8(b)(4) applies only to identification of the employer with whom the dispute exists—not to the content of publicity regarding the substance of the dispute. Contrary to Appellants' claim, *Tree Fruits* did not address the question of a truthfulness requirement in communication with consumers; the issue in *Tree Fruits* was whether the NLRA permits picketing to ask consumers not to buy a particular product.

[158]Brief for the Appellants, at 40, 63.

> hibiting "misrepresentations" in political campaigns, which on the face of the statute were not based on a finding of actual malice, was an overbroad infringement of First Amendment rights and was unconstitutional on its face.
>
> The statute here involved likewise contains no intent requirement and in fact is even broader since it is not limited to "deliberate misrepresentations". (A. 490.)

The State urges that the District Court incorrectly found the enforcement of Section 1385(B)(8) involved issues of prior restraint. Brief for the Appellant, at 60-61. Both the language of the Act and its enforcement expose the error in this contention. Provisions of the AERA provide for cease and desist orders or injunctions against all "unfair labor practices" including those like Section 1385(B)(8) designed to restrict boycott speech activity. Sections 1390(K) and 1393(A) permit the Board or any aggrieved party to obtain summary injunctive relief from a superior court without notice to stop boycott and strike activity. Both procedures have been utilized against the United Farm Workers to obtain such TRO's which acted as prior restraints on the Union's consumer-directed activities.[159] The Board issued, pursuant to Section 1390(C),

[159]*E.g.*, Enforcement Stipulation, Items 12, 13; A. 87-88. In *Agricultural Employment Relations Board v. United Farm Workers of America*, Pima County No. 153789, the Board obtained a TRO without notice which stated:

> IT IS ORDERED that Defendant United Farm Workers of America, its officers, agents, servants, employees and representatives and all persons in active concert or participation with them are hereby until further order of this Court, restrained and enjoined from:
>
> • • •
>
> B. Attempting to induce, encourage, restrain, coerce or otherwise interfere with executives or management of the aforementioned stores to make management decisions not to handle,

cease and desist orders against speech on allegations of unfair labor practices by the UFW.[160] The same procedure was utilized against the United Farm Workers to obtain summary injunctive relief in actions alleging Section 1385 (B)(8) as well as the other boycott regulations.[161]

The "truth" and "non-deceptive" requirements for consumer-directed publicity imposed by Section 1385(B)(8) exceed constitutional limitations. They invite, and require, inquiry into every aspect of union publicity to scrutinize the factual validity of the smallest claim of fact or opinion. Such review and regulation of speech is wholly inappropriate in any area of free speech and, particularly, in labor relations, where "uninhibited, robust and wide open" debate has been encouraged and found essential. *Cf., Letter Carriers v. Austin, supra,* 418 U.S. at 273.

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sell or distribute Gallo Brand products in violation of A.R.S. 23-1385(B)(7).

This is the TRO stipulated to by the parties in Item 12 of the Enforcement Stipulation. The entire TRO, not made part of the record, is attached hereto as Appendix D.

[160]Enforcement Stipulation, Item 11, Exhibit 11D; A. 85, 180:

Respondent, United Farm Workers of America, AFL-CIO, its officers, agents and representatives shall:

Cease and desist from picketing and urging *customers* and prospective customers not to shop at Roy's Arizona Pharmacy, Pueblo Liquor Stores, Market Spot and Super City Department Stores.

Cease and desist from inducing, encouraging, restraining and coercing *executives and management personnel* of Roy's Arizona Pharmacy, Pueblo Liquor Store, Market Spot and Super City Department Stores not to handle, sell or distribute Gallo wine. (Emphasis added.)

[161]Enforcement Stipulation, Items 7, 13; A. 84, 88.

B. Unconstitutional Limitations On The Scope Of Speech.

The second infirmity of Section 1385(B)(8) limits permissible inducements to circumstances involving a primary dispute; a union can induce or encourage consumers not to buy products only if produced "by an agricultural employer with whom the union has a primary dispute." This means that a labor organization may utilize the consumer boycott against an employer *only if* his own employees have a controversy over terms or conditions of employment at that ranch.

Such a limitation is impermissible. This Court, faced with the identical question in *A.F.L. v. Swing, supra,* 312 U.S. 321, struck down legislative efforts to silence speech relating to industry-wide concerns on the basis that because the "interdependence of all in the same industry has become commonplace," the state cannot exclude workers from exercising free communication "by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." *Id.*, 312 U.S. at 326. *Swing* held the First Amendment could not tolerate barriers to worker communications, even if the workers were not currently employed by the employer to whom the communications pertained, if they found the facts of the dispute relevant to their interests.

The rationale of *Swing* remains valid (*see, Virginia State Board of Pharmacy v. Virginia Citizens' Council,* 425 U.S. 748, 762-63), and Section 1385(B)(8)'s attempt to ban handbills and oral conversations, as well as picketing, related

to other employers in an industry who may be acting adversely to interests of workers in that industry cannot stand.

Section 1385(B)(8) then attempts even further inroads on communications that may have industry-wide or area-wide significance by prohibiting publicity directed at a trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name. Thus, the Union can not ask consumers to boycott "non-union" grapes even if *all* of the grape industry was non-union.[162] It is obvious, however, that Arizona grape workers could very well "deem . . . relevant to their interests" (*A.F.L. v. Swing, supra,* 312 U.S. at 326), the posture of every grape grower in the state toward unionization and would wish to communicate their concerns to the public even though some of those growers may not have an immediate controversy with their employees.

In many instances this provision would also ban the purest form of primary product boycott. Under its terms the UFW could not have undertaken its national boycott of Gallo wine. Even though the hundreds of Gallo employees who worked in Gallo's vineyards did have an immediate dispute with the Gallo company, most wines sold under the Gallo trademark also contain grapes Gallo purchases from small neighboring vineyards with some of whom

[162]This is another conscious departure from analogous NLRA provisions, presumably to avoid this Court's decision in *Tree Fruits, supra,* 377 U.S. 58, upholding product boycotts directed at the generic name of an agricultural commodity, Washington State apples, even though not all Washington State apple growers were involved in the labor dispute.

there was no dispute. Thus, consumers could not have been asked to boycott "Gallo" wines.[163]

This restriction of Section 1385(B)(8) insulates agricultural employers who are members of associations which market under trademarks, trade names or common label, or who enter into various business arrangements to grow crops with other agricultural employers. Such association and business arrangements are common in agriculture. *See, e.g.,* Herman and Zenor, *Land Transactions in California Agriculture,* 53 *Calif. St. Bar J.,* 48 (1978); Zerger, *The NLRA Agriculture Exemption—A Mechanical or Functional Approach,* II *Ind. Rel. L.J.,* 131 (1977).

C. Summary.

The invalidity of Section 1385(B)(8) is apparent. The substance of the Section enacts restrictions invariably rejected by this Court as inimical to free debate. Compounding these defects, the procedures enforcing Section 1385 (B)(8) provide for the issuance of *ex parte* temporary restraining orders which, in design and application, allow prior restraint of speech activities. Such restraint is, of course, constitutionally impermissible in an area affecting

[163]By prohibiting publicity directed at a product's generic name rather than its brand name, § 1385(B)(8) places an insurmountable burden on unions to identify products by employer. Agricultural goods are usually removed from their shipping cartons before being placed onto retailers' shelves. The same retailer frequently carries a different producer's produce each day, depending upon availability. However, unless the secondary employer volunteers the information or permits inspection in the backroom, it is virtually impossible to identfy every head of lettuce or bunch of grapes by producer. Even though the union may have a dispute with every supplier of the retailer, or even though the union may know that each is non-union, it cannot merely ask consumers to stop buying "non-union" products without determining which grower's produce is on the shelf that day.

First Amendment freedoms. *Carroll v. President and Commissioners of Princess Anne County, supra,* 393 U.S. 175; *Near v. Minnesota, supra,* 283 U.S. 697.

V.

SECTION 1385(B)(7) FORBIDS COMMUNICATIONS BETWEEN LABOR UNIONS AND MEMBERS OF THE PUBLIC IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

Ignoring the constitutional right to inform the public of the facts of a labor dispute (*Thornhill v. Alabama, supra,* 310 U.S. 88), the AERA imposes an absolute ban on a labor union's communication to members of the public for whom such communications are most vital and to whom they would be most effective. Section 1385(B)(7) prohibits *inducing* or *encouraging,* as well as threatening, restraining, and coercing management personnel to make a decision not to handle products of an agricultural employer with whom a labor dispute exists.[164] Incorporating no distinction between pure verbal speech and expressive conduct, this Section prohibits all oral conversations, written communications, and picketing which might induce or encourage retail support for a product boycott. The breadth of this ban extends not only to communications directed at management personnel, but also includes speech aimed at

[164]This Court has interpreted the NLRA to permit appeals to secondary employers to make "managerial decisions" to join a product boycott. *N.L.R.B. v. Servette,* 377 U.S. 46 (1964). That § 1385(B)(7) specifically prohibits inducing a "management decision" to cease handling any product, reflects yet another conscious choice by the AERA framers to go well beyond the NLRA's proscription of union speech activities.

consumers which might indirectly influence a management decision not to stock a product.

Common types of constitutionally-protected speech caught within the net of Section 1385(B)(7) include:

(1) Informing the public orally, by newspaper, radio or leaflet, that union contracts restrict or prohibit the use of pesticides, and urging a boycott of non-union products because of the danger of pesticide contamination.

(2) Verbally requesting the public to buy only union-label agricultural products in support of union efforts to outlaw child labor, control pesticide use, require toilets in the fields, increase safety precautions, or otherwise improve the working and living conditions of farmworkers through collective bargaining agreements.

(3) Oral discussions with market managers about the hazards of pesticide poisoning from non-union products, and suggestions that the market not offer such produce for consumption.

(4) General appeals to the public through advertisements, leaflets, television interviews, and news reports, urging support for farmworkers' efforts to unionize by buying only union-label products.

(5) Requesting store customers to ask management personnel for support of farmworkers' rights to organize by stocking union label goods and temporarily refraining from carrying certain non-union products.[165]

[165]These examples are not arbitrarily chosen unconstitutional interpretations speculating on the broadest application of § 1385(B)(7). They come within the ambit of enforcement attempts by the AERB and its General Counsel. *See, e.g.,* Enforcement Stipulation, Items 11, 12, Exhibit 11D; A. 85-87, 180. *See, also,* temporary restraining order discussed in fn. 159, *supra.*

Any of these speech activities, all of which involve either pure oral or written communications, could ultimately "induce or encourage" management personnel to stop selling a product and hence are swept under the prohibition of Section 1385(B)(7). Such communications with the public are, under the Act, not only unfair labor practices subject to *ex parte* restraint without notice, but also *crimes* punishable by fine or imprisonment. In broadly prohibiting all forms of expression which could ultimately "induce or encourage" management personnel to stop selling a product, Section 1385(B)(7) sweeps far beyond whatever legitimate interest the State may have in protecting neutral employers from coercive conduct, and imposes a blanket censorship of speech that strikes at the heart of the First Amendment. *Thomas v. Collins, supra,* 323 U.S. at 534-36; *Thornhill v. Alabama, supra,* 310 U.S. at 104-05; *Carlson v. California, supra,* 310 U.S. at 112.

A. Unions And The Public—Both Management Personnel And Consumers—Have A Vital Interest In The Vigorous Exercise Of Free Speech Rights During A Labor Dispute.

Section 1385(B)(7) infringes two fundamental rights: the right of a union and its supporters to publicize the facts of a labor dispute and the right of the public to receive such communications.

Communication with the public and other workers is often a primary objective and major strength of modern labor unions (*Thornhill v. Alabama, supra,* 310 U.S. at 103-04; *A.F.L. v. Swing, supra,* 312 U.S. at 325-26), with

free discussion of labor-management issues constitutionally guaranteed:

> [P]ublicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within the liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state. (*Carlson v. California, supra,* 310 U.S. at 113.)

Exposing substandard working and living conditions, unbridled use of pesticides, child labor law violations, the causes of farm labor disputes, and efforts through organization and collective bargaining to resolve those disputes and improve conditions is vital to farmworkers and "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama, supra* 310 U.S. at 103.[166]

Effective communication of such information is equally vital and constitutionally protected. Although certain restrictions on speech activities of labor disputants may be imposed, the state may not

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[166]That the interests of the contestants in a labor dispute are economic as well as informational and ideological is irrelevant to First Amendment protection.

> [I]t has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. [Citations omitted.] We know of no requirement that, in order to avail themselves of First Amendment protection, the parties to a labor dispute need address themselves to the merits of unionism in general or to any subject beyond their immediate dispute. (*Virginia St. Bd. of Pharmacy v. Virginia Citizens' Consumer Council, supra,* 425 U.S. at 762.)

> ...impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgement of freedom of speech and of the press concerning almost every matter of importance to society. (*Thornhill v. Alabama, supra,* 310 U.S. at 104.)

See also, Thomas v. Collins, supra, 323 U.S. 516; *A.F.L. v. Swing, supra,* 312 U.S. 321. Thus, farmworkers retain both the right to speak at the retail site, often the only effective place to publicize a farm labor dispute located in fields hundreds of miles away, and the right to communicate with consumers and management personnel, those members of the public who can most effectively respond to farmworkers' appeals for support.[167]

Commensurate with a union's right to speak out on labor issues is the public's right to hear such speech. *Virginia St. Bd. of Pharmacy v. Virginia Citizens' Consumer Council, supra,* 425 U.S. at 756-57. Of all segments of the public, retail management personnel have perhaps the greatest interest in receiving information about a particular product they may or may not stock.

A manager may freely exercise independent discretion as to whom he will deal with or which products he will market, including "reasons sufficient [only] to himself." *F.T.C. v. Raymond Bros.,* 263 U.S. 565, 573 (1924). *See also, U.S. v. Bausch & Lomb,* 321 U.S. 707, at 729 (1944). A management decision not to sell a product may be based upon the fact that it does not carry the "Good Housekeeping" seal, that it is likely to be contaminated with

[167]*See, e.g., Fortenbury v. Superior Court,* 16 Cal.2d 405, 106 P.2d 411 (1940); *Goldfinger v. Feintuch,* 11 N.E.2d 910, 276 N.Y. 281 (1937); *Galler v. Slurzberg,* 27 N.J. Super. 139, 99 A.2d 164 (1953).

pesticides, or that it was harvested by children. Intelligent exercise of this management discretion is incompatable with a ban on all communication between a union and management personnel which might "induce or encourage" a decision to stop handling a product.

B. Section 23-1385(B)(7) Closes All Channels Of Communication, From Pure Oral Speech To Expressive Conduct.

By imposing a ban on *all* inducement or encouragement which might lead to retail support for a product boycott,[168] Section 1385(B)(7) prohibits virtually all communication between a union and the public (including retail management personnel) about labor disputes.

"Inducement or encouragement" of a retailer would be established by a union supporter visiting with the retailer and explaining the labor dispute, politely urging that certain products be temporarily removed from the shelves. It would include person-to-person oral conversations with con-

[168]In its substance, the language of § 1385(B)(7) is very similar to the original House revision of NLRA § 8(b)(4) (29 U.S.C. § 158(b)(4)). That language was ultimately rejected by the Conference Committee because of its First Amendment implications. As Sen. Kennedy and Rep. Thompson pointed out:

> The prohibition [of the House bill] reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech.
> • • •
> [O]ne of the apparent purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement upon freedom of expression. (105 Cong. Rec. 16591, II *Leg. Hist. of the LMRDA* 1708.)

As this Court noted in *Tree Fruits, supra,* "[t]his analysis was the first step in the development of the publicity proviso" of Section 8(b)(4)(ii)(B), safeguarding "the right of unions to appeal to the public, even by some conduct which might be 'coercive.'" 377 U.S. at 69.

sumers, asking that they request management personnel to stop selling a product or that the consumers themselves stop purchasing that product. It is difficult to imagine more "pure" speech under the First Amendment than words uttered between interested groups of citizens: unions, consumers, and management personnel. Such broad bans on oral communication have been repeatedly held unconstitutional. *Schneider v. New Jersey,* 308 U.S. 147 (1939); *Thornhill v. Alabama, supra,* 310 U.S. 88; *Carlson v. California, supra,* 310 U.S. 106; *Ex Parte Blaney,* 30 Cal. 2d 643, 184 P.2d 892 (1947).

Unlawful "inducement or encouragement" under Section 1385(B)(7) would also include leaflets passed out to consumers requesting that they stop buying products or newspaper ads to the same effect. It would include distribution of literature, circulation of petitions, publication of articles, and much other union activity publicizing, in written form, the facts of labor disputes. This provision would be violated if a union or its supporters publicized a labor dispute by radio or newspaper, and that publicity indirectly persuaded a management person to stop doing business with the agricultural grower involved in that dispute. However, the written word, including leaflets, has always been accorded protection by the First Amendment. *Organization For A Better Austin v. Keefe, supra,* 402 U.S. at 419; *Schneider v. New Jersey, supra,* 308 U.S. 147; *Lovell v. City of Griffin,* 303 U.S. 444 (1938); *Talley v. California,* 362 U.S. 60 (1960); *Branzburg v. Hayes,* 408 U.S. 665 (1972). This protection has been extended to include written communication of the facts of a labor dispute (*Thornhill v. Alabama, supra,*

310 U.S. at 101; *Carlson v. California, supra,* 310 U.S. at 112-13), and includes even leaflets which have a "coercive impact":[169]

> This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment . . . The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. (*Keefe, supra,* 402 U.S. at 419.)

In Section 1385(B)(7), Arizona bans verbal and written speech which "induces" or "encourages" as well as that which "coerces." If the State cannot constitutionally prohibit the latter, it surely cannot prohibit the former.

Finally, Section 1385(B)(7) bans all picketing which might induce a management decision to stop handling the product of an agricultural grower embroiled in a labor dispute. This ban would include not only picketing aimed at the retailer, but also picketing directed only to consumers asking that they boycott a product,[170] or mere informational

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[169]In *Tree Fruits, supra,* 377 U.S. 58, this Court held that the NLRA could not be interpreted to exclude leafleting which encourages consumers not to patronize a retail store.

[170]This Court has recognized a constitutional right to engage in product picketing. *Bakery & Pastry Drivers v. Wohl,* 315 U.S. 769 (1942). In *Tree Fruits, supra,* 377 U.S. 58, this Court held that the NLRA Publicity Proviso to § 8(b)(4) could not be interpreted to exclude peaceful picketing advising the public not to buy certain products. Although a narrow statutory construction avoided resting the decision on constitutional grounds, a traditional technique, this Court made clear that "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment," (*Id.,* 377 U.S. at 63), and acknowledged that Congress felt a prohibition of this type of consumer picketing would be unconstitutional (*Id.,* 377 U.S. at 69). *See also,* II *Leg. Hist. of LMRDA* 1708. Mr. Justice Black, concurring in the result of *Tree Fruits,* thought Congress intended

picketing to expose pesticide contamination or mobilize public support (other than for a boycott). Such a blanket proscription of all picketing to help publicize a labor dispute is unconstitutionally impermissible. *Thornhill v. Alabama, supra,* 310 U.S. 88; *A.F.L. v. Swing, supra,* 312 U.S. 321; *I.B.T., Local 695 v. Vogt,* 354 U.S. 284, 294-95 (1957).[171]

C. No Compelling State Interest Justifies Such a Broad Encroachment Upon The Fundamental Right Of Free Speech.

Regulation of pure speech and expressive conduct may be imposed by the State only where restrictions are reasonably calculated and narrowly drawn to further substantial governmental interests. *U.S. v. O'Brien, supra,* 391 U.S. at 376-77. Where those interests can be achieved by a lesser restraint on individual liberty the State must do so. *Shelton*

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to ban such activity and would have found the restriction unconstitutional. *Id.*, 377 U.S. at 79. Justice Black's view was later cited favorably by this Court in *Police Dept. v. Mosley,* 408 U.S. 92 at 98 (1972).

Many state courts have held that there is a constitutional right to engage in product picketing at the retail outlet. *See, e.g., People v. Muller,* 36 N.E.2d 206, 286 N.Y. 281 (1941);*Ellingsen v. Milk Drivers,* 35 N.E.2d 349, 377 Ill. 76 (1941); *Alliance Auto Service v. Cohen,* 19 A.2d 152 (Pa.S.Ct., 1941); *Mason & Dixon Lines v. Odom,* 18 S.E.2d 841 (Ga. S.Ct., 1942); *Ohio Valley Ad. v. Sign Painters,* 138 W.Va. 355, 76 S.E.2d 113 (1953); *Galler v. Slurzberg, supra,* 27 N.J. Super. 139, 99 A.2d 164; *Netherton v. Davis,* 234 Ark. 936, 355 S.W.2d 609 (1962). *Cf., Goldfinger v. Feintuch, supra,* 276 N.Y. 281, 11 N.E.2d 910; *Johnson v. Milk Drivers,* 195 So. 791 (La. App., 1940); *Fortenbury v. Superior Court, supra,* 16 Cal.2d 405, 106 P.2d 411; *Englander v. Tishler,* 280 App.Div. 217, 112 N.Y. Supp.2d 611 (1952).

[171]The dissenters in *Tree Fruits, supra,* could justify a total prohibition on all consumer picketing under the First Amendment only "when, as here, *other methods of communication are left open*". 377 U.S. at 93 [Emphasis added]. Under § 1385(B)(7), *no* channels are left open if the effect is to induce or encourage a management decision not to handle a product.

v. Tucker, supra, 364 U.S. 479; *U.S. v. Robel, supra,* 389 U.S. 258.

In prohibiting not only expressive conduct but also the purest forms of verbal communication, Section 1385(B)(7) extends far beyond any legitimate state interest in regulating particular hamful conduct, and imposes a blanket censorship on free discussion of the facts of a labor dispute. Throughout the course of this litigation, the State and the growers have failed to suggest any constitutional rationale for the Free Speech restrictions of Section 1385(B)(7). Instead they advance innuendo, implying that this provision is necessary to fully prohibit "secondary" boycotts.[172] This position is untenable. Whatever secondary activity the State can regulate is already prohibited by Section 1385 (B)(6).[173]

Although direct or indirect encouragement of retail managers to stop selling a particular product falls squarely with the realm of protected boycott activity, it is still prohibited by Section 1385(B)(7). Thus, Section 1385(B)(7) reflects an intrusive and biased concern that third parties may be *persuaded* by the message espoused by a union to act against the interests of an agricultural employer, a crass economic interest evident throughout the AERA: insulation of agricultural growers from the economic impact of farmworker organization. This economic interest, however, can never justify the severe encroachment on fundamental freedoms found in Section 1385(B)(7):

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[172]Appellants repeatedly refer, without explanation, to consumer product boycotts as "secondary pressures". *See, e.g.,* Brief for the Appellants, p. 59.

[173]§ 1385(B)(6) incorporates Arizona's already-existing secondary boycott restrictions of § 1323. *See,* fn. 155, *supra.*

> It may be that effective exercise of the means of *advancing public knowledge may persuade some* of those reached *to refrain from entering into advantageous relations* with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But *the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.* (*Thornhill v. Alabama, supra,* 310 U.S. at 104; emphasis added.)

See also, Virginia Pharmacy v. Virginia Citizens' Consumer Council, supra, 425 U.S. at 764-70.

While prohibiting and imposing penal sanctions on all communication between union and retail management which might encourage a decision to stop handling a product, the AERA contains *no restriction* on growers inducing, through economic coercion or otherwise, retail management to stock products which are the subject of a labor dispute. For example:

> (1) Although a union supporter could not ask that non-union tomatoes be removed from the shelves because of pesticide contamination, an agricultural grower could freely market those tomatoes as a "natural" food, implying that consumption would be entirely healthful.
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> (2) While an agricultural grower could urge retailers and consumers to purchase its non-union lettuce on the basis of a low price, a union could not explain to purchasers that the cheap price is due to substandard wages paid the farmworkers who cultivated and harvested that lettuce.

Discriminating between messages which the public may hear is censorship in its most odious form and is unconstitutional under both the First and Fourteenth Amendments. *Cox v. Louisiana,* 379 U.S. 536 (1965). "Far from being tailored to a substantial governmental interest, the discrimination . . . is based on the content of . . . expression. Therefore, under the Equal Protection Clause, it may not stand." *Police Dept. v. Mosley,* 408 U.S. 92 at 102 (1972).[174]

D. Summary.

Section 1385(B)(7) prohibits pure verbal speech between a union and those members of the public most interested in the facts of an agricultural labor dispute, management and consumers. Union activity which should be most encouraged, peaceful verbal communication, is completely outlawed if it encourages a management decision not to handle a certain product. Talking with a member of the public, a store manager, is made a crime in Arizona for farmworkers seeking support in a labor dispute. The threat of *ex parte* restraining orders hangs over every word spoken or written by a union and its supporters in attempts to reach the public about labor-management disputes. *Cf., Thomas v. Collins, supra,* 323 U.S. at 534.

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[174]Furthermore, while § 1385(B)(7) would prohibit communication by a union to consumers or management urging a boycott of non-union milk, an appeal by the Governor urging a public boycott of all dairies not complying with federal standards for aflatoxin levels (a carcinogen) in milk would be lawful. Governor Babbitt did precisely this in 1978. *See, Mother Jones,* p. 9 (Dec., 1978). Similarly, a clergyman could speak privately with a retail store manager and ask that certain products be removed from the shelves because they were grown by an avowedly atheist commune. A nun, asking the same store manager to remove grapes from the shelves because they were grown by an avowedly anti-union grower would be guilty of violating § 1385(B)(7).

The possibility of a limited interpretation by a state court or administrative agency cannot save Section 1385 (B)(7) from its facial defects:

> If there is an internal tension between proscription and protection in the statute, *we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights.* Broad prophylactic rules in the area of free expression are suspect [citations omitted]. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. (*N.A.A.C.P. v. Button,* 371 U.S. 415, 438 (1963).)

Statutes regulating fundamental rights, including freedom of expression, must be carefully tailored to serve legitimate state interests. *Dunn v. Blumstein,* 405 U.S. 330 (1972); *U.S. v. Robel, supra,* 389 U.S. 258; *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Shelton v. Tucker, supra,* 364 U.S. 479. Section 1385(B)(7) dismally fails any such test.

VI.

SECTION 1385(B)(12), BY OUTLAWING ALL RECOGNITIONAL, ORGANIZATIONAL AND INFORMATIONAL PICKETING AND BOYCOTT ACTIVITY, MERELY UPON THE FILING OF AN ELECTION PETITION BY AN EMPLOYER, UNCONSTITUTIONALLY RESTRICTS FIRST AMENDMENT RIGHTS.

Section 1385(B)(12) broadly prohibits labor organizations from picketing, boycotting, or threatening to picket or boycott, an agricultural employer for recognitional or organizational purposes where an election petition has been filed under Section 1389. Since Section 1389(C)(2) allows an employer election petition, Section 1385(B)(12)

extends to a grower the unrestricted power to prohibit picketing and boycott activities. Not only is the provision facially overbroad in its regulation of activities protected by the First Amendment, but it operates as an unlawful prior restraint of such activities.

A. Broad Departure From Federal Act.

In Section 1385(B)(12), Arizona wrote a complete prohibition of traditional union activities to secure organization and recognition. The Statute's language significantly and intentionally sweeps more broadly than analogous language found in Section 8(b)(7) of the NLRA (29 U.S.C. Section 158(b)(7)). The history of Section 8(b)(7), and its practical effect, supplies a perspective from which the significant impact of Section 1385(B)(12) can be appreciated.

Section 8(b)(7) of the NLRA has been described as a limited regulation designed to remedy a very specific evil. *International Brotherhood of Teamsters, Local 344 v. N.L.R.B.,* 568 F.2d 12, 21 (7th Cir., 1978). The federal regulation operates only when a union fails to file a petition for a representational election within thirty days of the commencement of picketing. Recognitional and organizational picketing can continue pending the holding of an election and certification of the results if a petition has been filed. *Dayton Typographical Union No. 57 v. N.L.R.B.,* 326 F.2d 634, 647 (D.C. Cir., 1963).

A broad range of organizational and recognitional activities are excluded from regulation under Section 8(b)(7) of the NLRA. It affects only picketing, and has no application to boycott activity. An explicit free speech proviso,

omitted from the AERA, allows a union to engage in informational picketing at any time.[175] *N.L.R.B. v. Knitgoods Workers Union Local 155,* 403 F.2d 388, 390 (2nd Cir., 1968); *Dunn v. Retail Clerks International Associations,* 307 F.2d 285, 289 (6th Cir., 1962). "Area standards" picketing to inform the public that an employer does not maintain union standards is thereby protected. *Centralia Building and Construction Trades Council v. N.L.R.B.,* 363 F.2d 699, 701 (D.C. Cir., 1966). The AERA prohibits similar conduct in agriculture. Arizona's intent to prohibit informational picketing is further established by the substitution of the terms "induce, encourage, force or require" for the language of the federal act prohibiting activities aimed at "forcing or requiring" an agricultural employer or employees to recognize or support the union.

In upholding Section 8(b)(7) of the NLRA against constitutional challenge, the courts have relied upon these limiting features of the provision. *Dayton Typographical Union No. 57 v. N.L.R.B., supra,* 326 F.2d at 646-649.

B. Section 1385(B)(12) Provides An Agricultural Employer With Power To Totally Ban Free Speech Activities.

Once anyone, including an agricultural employer, files an election petition under Section 1389 of the AERA, *all*

[175]The proviso states:

> *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. (29 U.S.C. § 158(b)(7).)

boycott and picketing activity aimed at promoting recognitional or organizational purposes becomes criminal. In outlawing informational picketing, Section 1385(B)(12) far exceeds any reasonable regulation the state may enact regarding picketing. Moreover, the regulation extends far beyond any concern for agricultural production, by reaching boycott activities, including informational leafletting and oral communications made in support of a primary boycott. The broad sweep of Section 1385(B)(12) completely stifles any right of a union to free expression after the filing of an election petition. As this Court noted in *Thornhill v. Alabama, supra,* 310 U.S. at 102:

> Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensible to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by the regulations such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem.

In addition, whereas the federal regulation applies only when a union seeks to engage in indefinite recognitional or organizational picketing and fails to file an election petition within thirty days, Section 1385(B)(12) operates to broadly restrict a union's activities upon the action of anyone who files an election petition. Under Section 1389(C)(2) of the AERA, an agricultural employer may file an election petition when it alleges that one or more individuals or labor organizations have presented a claim to be represented. When these conditions are met, an employer has

total control over union organizational and recognitional activities, and can halt them by filing an election petition.

Moreover, an employer can file an election petition alleging that a claim has been presented to him, and on that basis obtain an order restraining all strike or boycott activity under Section 1393(B).[176] Section 1393(B) requires the court to issue a restraining order based on these allegations, without allowing prior inquiry into the truth of the employer's allegation that a representational claim has been made.[177]

This Court has frequently invalidated state regulations which condition the exercise of First Amendment freedoms on the undirected discretion of local officials. *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Cox v. Louisiana, supra*, 379 U.S. 536; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Section 1385(B)(12) takes these regulations

[176] § 1393(B) is discussed at length in Part III, *supra*.

[177] In addition, an employer could obtain such a restraining order by inducing an individual to make a claim on him for representation. The NLRA contains explicit safeguards against such conduct which were omitted from the AERA. In the first place, the NLRA does not permit private parties to obtain injunctions of conduct violative of § 8(b)(7). Secondly, the provision authorizing the Board to obtain a restraining order, § 10(1) (29 U.S.C. § 160(1)), provides a safeguard against the issuance of such orders where there is reasonable cause to believe that an employer has dominated, supported, or interfered with a labor organization. The NLRA provision reads, in pertinent part:

> *Provided further*, That such officer or regional attorney shall not apply for any restraining order under Section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the premliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. (29 U.S.C. § 160(1).)

Arizona deliberately omitted this safeguard against collusive use of the provision by an employer. (*See*, AERA § 1390(K).)

a step further, by entrusting an interested employer with the power to mandate a total ban of organizational and boycott activities by a labor organization.

The Act's enforcement reflects the abuse of First Amendment rights which results from the operation of Section 1385(B)(12). In two separate actions, employers filed election petitions to prevent picketing by the Teamsters. In both cases, the employers withdrew the election petition after the end of the season and no elections were held.[178] Thus, actual experience illustrates the self-executing nature of the ban the Statute places on free expression, and the improper nature of the power it gives to employers.

The very existence of Section 8(b)(7) of the NLRA, as a limited regulation of expression tailored to further a specific governmental interest, points out the invalidity of Section 1385(B)(12). In the area of the regulation of First Amendment freedoms, it is well established that where the government can further its interest by a lesser restraint on individual liberty at little or no added inconvenience, it must do so. *Shelton v. Tucker, supra*, 364 U.S. 479; *United States v. Robel, supra*, 389 U.S. at 267-68.

[178] These cases are set forth in Enforcement Stipulation, Items 6, 8; A. 84. The formal documents are included, *Id.*, Items 6, 8; A. 84, 148-62.

VII.

THE AERA'S ELECTION PROCEDURES FRUSTRATE WORKER EFFORTS TO DESIGNATE A COLLECTIVE BARGAINING REPRESENTATIVE WHILE ITS LIMITATIONS ON PERMISSIBLE COLLECTIVE BARGAINING PREVENT MEANINGFUL NEGOTIATIONS, THEREBY REPUDIATING THE STATED POLICIES OF THE AERA AND VIOLATING THE CONSTITUTIONAL RIGHT OF ASSOCIATION.

Appellants urge that the AERA's recognition procedures withstand constitutional scrutiny because the mandated election procedures (Section 1389) allow accelerated elections similar to the California Agricultural Labor Relations Act[179] and adopt the recognition provisions of the National Labor Relations Act.[180] The unequivocal statutory language and the record before the District Court belie this attempted comparison, and thus the State's conclusion: That the AERA's recognition procedures do not unduly burden constitutionally-protected associational interests. Close scrutiny of the Act reveals significant interference with the associational interests of Arizona farmworkers, both in the available opportunity to designate a collective representative and to negotiate a meaningful collective bargaining agreement. The State comes before this Court with no substantial policy justifying or explaining this interference.

The State and the growers attempt to dislodge the District Court's invalidation of the AERA's representation

[179]California Labor Code § 1140 *et seq.*

[180]Brief for the Appellants, at 58.

section by masking it from this Court's scrutiny with a smokescreen of purportedly impregnable "legislative policy choice."[181] Yet, they concede the Act's election procedure substantially inhibits designation of a collective bargaining representative in 78% of Arizona's agricultural employment,[182] a concession which focuses the insubstantiality, and constitutional inadequacy, of any claimed "policy choices" reflected in the comprehensive regulation (and, as will be shown, undermining) of Arizona farmworkers' associational interests. This Court, as did the District Court, clearly has the mandate to "strike through the mask"[183] the State invokes and to weigh the Act's recognition procedures against the infringement of associational rights these procedures work.

Even if workers could succeed in designation of a union to represent their interests to a grower, the Act insulates him from a duty to negotiate many important and funda-

[181]Brief for the Appellants, at 53 *et seq.*

[182]Brief for the Appellants, at 46. Appellants' argument that the election procedures must be unworkable in *all* circumstances reveals a fundamental misreading of this Court's delineation of the constitutional right of association. In *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), there was no requirement that petitioner show that compelled disclosure inhibited all its members; rather, this Court was concerned with the challenged statute's "substantial restraint" (*Id*, 357 U.S. at 463) upon associational interests. As the discussion which follows reveals, the Act works a "substantial" interference with the associational rights of Arizona farmworkers.

[183]

> "Hark ye yet again,—the little lower layer. All visible objects, man, are but as pasteboard masks. But in each event—in the living act, the undoubted deed—there, some unknown but still reasoning thing puts forth the moulding of its features from behind the unreasoning mask. If man will strike, strike through the mask."

Herman Melville, *Moby Dick*, 139 (Riverside Edition, 1959).

mental issues in labor-management relations.[184] For example, under the Act growers statutorily maintain a right to terminate employees at will and workers cannot insist upon a contract requiring cause for termination of employment. A union, and its agents, become liable to criminal prosecution for raising, at the negotiating table, seniority job assignment, just cause for discharge or severance pay for inclusion in a contract.[185] Such prohibitions, of which numerous other examples can be presented, effectively withdraw any opportunity for meaningful collective bargaining.

The constitutional right of association[186] stands as an effective check upon the extensive interference with associational interests which the Act produces. This right, recognized as applicable to labor unions,[187] protects Arizona farmworkers' efforts to organize together for advancement of their wages and working conditions. This protection prohibits Arizona's enactment of legislation foreclosing farmworker organizing for collective gains; yet, the AERA is precisely such an enactment. No policy justifies the barriers to farmworkers' organizational interests erected by the Act, thus mandating the District Court's conclusion that it "frustrat[es] the right of free assembly and association."[188] The record reveals the absence of any support

[184]§§ 1384, 1385(B)(11) and 1385(D).

[185]See discussion, at Part VII, C, *infra*.

[186]*See, e.g., Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); *N.A.A.C.P. v. Alabama, supra*, 357 U.S. at 460-61.

[187]*United Mine Workers v. State Bar of Illinois*, 389 U.S. 217, 221-22 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 5 (1964).

[188]A. 487.

for the State's facile claim that the AERA reflects a permissible enactment based upon "available policy choices."[189]

Arizona's stated policy, the touchstone by which to examine the validity of the Act's election procedures and collective bargaining restrictions, recognizes "that agricultural employees shall be free to organize, to take concerted action, and through representatives . . . enter into collective bargaining agreements establishing their wages and terms and conditions of employment . . . ."[190] Repudiating this statement of policy, the Act's recognition procedures, and the limitations placed upon the scope of collective bargaining, frustrate workers' advancement of wages and conditions of employment through collective bargaining. The Act's substantive and procedural dictates, when viewed with reference to the circumstances in which they were intended to operate, undermine and mock the State's declaration of a policy encouraging farmworker organizing and collective bargaining. This mockery, "illogical and unjust" (*Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)), also sustains the District Court's invalidation of the election section of the Act; the total disharmony between stated purpose and implementing language is constitutionally infirm.[191]

[189]Brief for the Appellant, at 54.

[190]§ 1381. This declaration of policy reappears in the substantive rights accorded farmworkers. § 1385, which declares the rights of agricultural employees, incorporates the Arizona policy as set forth in § 1381.

[191]Where a state posits a substantial right, as occurs under the Act for Arizona's farmworkers (Section 1385), constitutional principles require a logical and justified relationship between the right and its

A. The Act's Election Procedures Disenfranchise Substantial Numbers of Employees With an Interest in Designation of a Collective Bargaining Representative and are Unworkable in the Context of Agriculture, Thus Preventing Agricultural Workers From Securing Recognition of a Collective Bargaining Representative.

Farmworkers, just as other workers, have a substantial interest in designation of a representative for collective negotiations with a grower. The Act purports to recognize this interest.[192] Yet, the AERA denies many farmworkers the opportunity to express this interest by incorporating extremely narrow definitions of those workers able to participate in a representation election. This denial relegates many workers to a second class participation in any decision concerning their representation by a union and permits a minority of the workforce to dictate whether a collective bargaining agent will be recognized. Excluded from the State's recognition process, these workers are impotent to associate together to advance their wages and working conditions through collective action.

Even for workers deemed eligible to participate in a representation decision the Act operates to frustrate any desire for representation by a union. The periods of substantial employment in the majority of crops produced by

implementation. *See, e.g., Jiminez v. Weinberger*, 417 U.S. 628 (1974); *Weber v. Aetna Surety & Casualty Co., supra*, 406 U.S. at 175. *Cf., Hampton v. Mow Sun Wong*, 426 U.S. 88, 113-16 (1976).

[192]§ 1385.

Arizona agriculture are very short, usually numbering only several weeks for any employer.[193] Ignoring this fact, the Arizona Legislature has dictated election procedures under the Act incapable of operating during the course of the short season. Workers interested in designation of a collective representative are foreclosed from expression of that interest. Effectively, the Act "legislatively delays" the opportunity for farmworkers to designate a collective bargaining representative and declares as unlawful any concerted action to overcome that delay.[194]

1. The Act Writes Exclusions Incomprehensible in Light of the Act's Purpose and the Constitutional Right of Association.

The Arizona Legislature's obvious concern in enactment of the AERA was the whole of agriculture, for one stated purpose of the Act is prevention of interference with the marketing of agricultural commodities.[195] Abandoning this concern when considering workers' rights, the Act writes exclusions incomprehensible in view of the Act's ostensible coverage of the whole of Arizona's agricultural production. In excluding a large number of workers from representation decisions, the State places a substantial burden upon their right to associate.[196]

[193]A. 471, 283-89.

[194]§ 1385(B)(12).

[195]§ 1381. One of the declarations in this statement of policy is that agricultural employees hold a disproportinate share of the economic power in the agricultural context. This finding is unsupportable and unacceptable. *See*, Cohen and Rose, *State Regulation of Agricultural Labor Relations*, 1973 Law and Soc. Order 313, 315-22 (1973).

[196]In this light, the exclusions of the Act are comprehensible only if the Act's true aim is to disenfranchise most workers and to defeat unionization.

The Act sets forth narrow classes of persons deemed competent to participate in the designation of a collective bargaining representative. It defines "agricultural employee" to include only two groups of workers: (1) Permanent employees who have worked for six months during the preceding calendar year and (2) temporary employees who have worked in the growing or harvesting of farm products during the preceding year for the employer.[197] An employee working for an employer in a previous harvest season as well as a current season in the same calendar year cannot participate in an election proceeding. New employees with the expectation of returning the following year are denied the opportunity to express a desire for collective representation by a union. A long-term employee missing the preceding year for any reason is statutorily incompetent to express his interest regarding a union.[198]

[197] § 1382(1) reads, in pertinent part, as follows:

> "Agricultural employee, permanent" means any employee over sixteen years of age who has been employed by a particular agricultural employer for at least six months during the preceding calendar year, engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field. "Agricultural employee, temporary" means any employee over sixteen years of age who is employed by a particular agricultural employer and who has been so employed during the preceeding calendar year, engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field.

[198] The Act's definition of agricultural employee means, for example, that if a representation proceeding is held in December of any year, a permanent employee working since the previous July 2nd (over a year and a half) is unable to participate in the election. § 1382; Regs. § R4-201(A)(7). *Compare, Kusper v. Pontikes, supra,* 414 U.S. 51. Appellants, straining to avoid this impact of the term "calendar year" (Jurisdictional Statement at 21) ignore the clear language of the Act. *See,* discussion, Part II, *supra.*

The statutory exclusion of new employees invites employer manipulation of the workforce to interfere with any organizing efforts. Since a grower enjoys a statutorily-protected right to subcontract work, he could, one year, employ the workers to produce his crop and the next year utilize employees supplied through a labor contrator.[199] Such a practice would effectively deny his workers any means to express an interest for collective representation. Active union supporters could be threatened with discharge or loss of benefits by an employer with the Act's prohibitions proscribing such conduct only if the *sole*[200] motivation for such conduct was anti-union animus; tardiness on one occasion would legitimate such threats.

The statutory exclusions written by the Act's definition of agricultural employee and the opportunities for employer determination of eligibility burden farmworkers' constitutional right of association. One, if not the primary, purpose for farmworker organization is "to exert influence upon [an employer] . . . to induce him to make better terms with them." *American Foundaries v. Tri-City Central Trades Council,* 257 U.S. 184, 209 (1921). Under the Act, certification pursuant to election proceedings stands as an absolute barrier to a demand for collective negotiation. The Act deprives many workers of any opportunity to participate in elections and thereby frustrates the very purposes for which farmworkers organize. This constitutes an imper-

[199] The definition of agricultural employer excludes employers with less than six agricultural employees. § 1382(2). However, under this section, an excluded employer can elect coverage. By an election to be covered, this small employer could invoke the procedures of the Act to restrict picketing and boycotts but nonetheless, by manipulations of employment, prevent representation proceedings.

[200] § 1385(A)(7).

missible burden on the right to associate, for the Act's deprivation to many workers "of any voice in choosing" a union representative "substantially abridge[s]" their "ability to associate effectively with" the union of their choice. *Kusper v. Pontikes, supra*, 414 U.S., 58.

N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), squarely stands as a constitutionally-based condemnation of the restraint upon associational interests written by the Act. In *N.A.A.C.P. v. Alabama,* this Court recognized that state statutes which inhibit a person from joining with others for common benefit cannot stand without some substantial justification. Just as disclosure of membership may cause unwillingness to join an organization, denial to a worker of the right to participate in designation of a collective bargaining representative undermines any desire or opportunity to associate with others for collective action to better wages and working conditions.

The State can point to no justification for the infringement of associational interests which the definitions of "agricultural employee" cause. *See, Williams v. Rhodes,* 393 U.S. 23, 31 (1968). Nothing suggests that workers deemed incompetent to participate in election proceedings have any less interest in representation decisions than those workers permitted by the Act to participate in such decisions.

The Act incorporates other exclusions of agricultural workers which similarly are inexplicable in terms of the Act's policy. Excluded from the statutory definition of agricultural employees are all individuals "[e]ngaged in hauling or stitching functions." These workers perform

functions integral to the transfer of agricultural commodities from the site of production (the field) to the point of distribution or processing; "stitchers" make the boxes in which produce is packed, while "haulers" transport goods from the field to a processing shed or marketing location. An interruption of these functions closes down the harvest operations, affecting not only the marketing of crops, but placing harvest workers out of work.[201] Despite the Arizona Legislature's stated concern for interruptions in the marketing of perishable commodities, it has written the total exclusion of "haulers" and "stitchers" from the Act. Similarly, another exclusion illogically declares workers under sixteen unable to participate in representation proceedings in spite of Arizona's determination that agricultural workers under sixteen are qualified to negotiate their own wages.[202]

The Act effects, with an unjustified consistency, an interference with the right to associate by radically circumscribing the class of workers eligible to participate in representation proceedings. This result, constitutionally foreclosed, also reflects a statutory rejection of the stated purpose of the Act to encourage collective action by workers. Similar conclusions are inescapable upon scrutiny of the election procedures dictated by the Act.

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[201] A. 391-94.

[202] Arizona has adopted a Minimum Wage for Minors law, which establishes a commission with power to designate wages for minors under 16 in all activities where they are employed, except domestic and *agricultural* work. A.R.S. § 23-311 *et seq*. Persons under 16 are readily able to work in the fields. A.R.S. § 15-321(B)(6).

B. The Recognition Provisions of the Act Deny Farmworkers the Right To Designate a Collective Bargaining Representative.

The State and the growers are content to characterize the AERA's representation provisions as an improvement upon the NLRA and thus beyond reproach.[203] Such an analysis ignores simple, yet crucial differences: The AERA designates procedures which effectively eliminate recognition through an election by ignoring the circumstances of the industry in which they are designed to operate and prohibits all non-election methods of securing recognition.

The State's invocation of an ostensible parallel between the AERA and the NLRA ignores the undisputed fact that the AERA was purportedly designed in response to unique circumstances in agriculture.[204] Appellees have not asserted that better procedures could have been designed, but that the representation procedures of the AERA preclude legitimate demands for recognition advanced by a labor organization. This conclusion, as found by the District Court, is inescapable.

Despite the seasonality of Arizona agriculture, the Act avoids any legislative determination of the appropriate time for the filing of a petition seeking recognition.[205] This omission statutorily allows less than one per cent of the employees of an employer during the course of a year to

[203]Brief for the Appellants, at 56-57.

[204]*See*, § 1381.

[205]In contrast, the California Legislature in the California Agricultural Labor Relations Act, *supra* at n. 66, specified that an election petition was timely only during periods when 50% of an employer's highest yearly workforce was employed. Calif. Labor Code § 1157.3. This insures that a substantial percentage of the workforce is working when election proceedings are held.

designate the collective bargaining representative for all employees in similar jobs. The lack of any limitation on the timeliness of a petition for recognition allows elections held when a substantial number of the workers are absent to dictate the collective bargaining agent to which the employees must look or to prevent the holding of an election; the large segment of an employer's workforce would be required to look to a collective bargaining representative preferred by only a small minority. The right to organize has little importance if any effort to select a representative can be halted by the acts of a substantial minority of an employer's workforce.

This infringement upon associational interests could not be remedied by incorporation into the Act of a requirement that elections are timely only during periods of substantial employment on a particular farm. The Seasonality Stipulation reveals that, except in some isolated instances, the period of at least fifty per cent employment for any one employer lasts no longer than five weeks.[206] Any analysis of the Act's election procedures must thus proceed with this backdrop of a five week election period, a time undisputably too short for completion of all the prerequisites for a certification election.

Some organizational activity among employees must occur prior to any submission to the AERB of a claim to be recognized as the collective bargaining agent for those employees. Procedurally, authorization cards from at least thirty per cent of an employer's employees must be

[206]A. 192 *et seq*. See also, Plaintiffs' Exhibit 1 summarizing the Seasonality Stipulation; A. 283-89. The District Court found that short seasons predominate. A. 471-72.

secured.[207] Practically, workers must be informed of the benefits of unionization, allowed to explore any doubts, and advised of the right to designate a collective bargaining representative. A substantial number of the employees must evidence support for a union prior to a petition, or the mere act of petitioning will result only in a lost election if one is held. The undisputed testimony revealed that a three to six week period of organizing prior to a petition must occur for an election to have any meaning.[208]

The substantial part of this organizing cannot precede the commencement of the period of substantial employment for the simple reason that prior to employment many workers are unavailable; workers in agriculture migrate long distances to reach the job. And, communication with workers requires time-consuming individual contact. Under the best of circumstances, a three week period for organizing during substantial employment must precede an election petition. Under the constraint of a five-week harvest season, the election must follow within two weeks of the filing of a petition to avoid a year's delay in recognition proceedings; this the Act forecloses.

Upon the filing of a petition, Section 1389(C) requires a pre-election hearing to determine whether a question of representation exists and to designate the appropriate bargaining unit. The regulations of the AERB require this

[207] § 1389(C)(1).

[208] A. 335-40. *See also, Agricultural Labor Relations Board v. Superior Court,* 16 Cal.3d 392, 546 P.2d 687, 128 Cal.Rptr. 183 (1976), *appeal dismissed,* 429 U.S. 802 (1976), *see infra,* fn. 234. The organizational problems are compounded because of agricultural employees' unfamiliarity with unions. Unionization in agriculture is a comparatively recent occurrence.

hearing to develop "a full and complete record" and the hearing officer has the right to continue the hearing and to allow for the filing of briefs within seven days of the conclusion of the hearing. Any decision must be served upon all parties.[209] The Act and the regulations thus contemplate extended pre-election proceedings before a decision directing an election, such a decision being the purpose for which the hearing is held. Although experience under similar procedures shows that similar procedures consume 45 days between the filing of a petition and the direction of an election,[210] under the best of circumstances the AERB might be able to direct an election fourteen to twenty-one days after the filing of a petition.[211]

Following the direction of an election, the Act mandates an inexplicable ten-day hiatus in election proceedings.[212]

[209] Regs. § R4-222 provides, in pertinent part, as follows:

> A. [Representation] hearings shall be conducted by a hearing officer and shall be open to the public. . . . It shall be the duty of the hearing officer to inquire fully into *all* matters in issue and necessary to obtain a full and complete record. . . . A copy of the decision shall be served on all parties.
>
> B. The hearing officer may, in his discretion, continue the hearing from day to day or adjourn it to a later date. . . .
>
> C. . . . The hearing officer may allow oral argument, briefs to be submitted or both. Where briefs are to be submitted, any party desiring to do so shall file the original and one copy within seven (7) days after the close of the hearing provided however, that prior to the close of the hearing and for good cause shown, the hearing officer may grant an extension of time not to exceed an additional seven (7) days. (A. 539-40; emphasis added).

[210] A. 411-14.

[211] This time period accounts for the necessity of providing "due notice" of the hearing to the parties, setting the hearing, taking evidence and the rendering of a decision. Of course, this assumption presumes the unlimited availability of hearing officers. If many petitions were filed at the same time, the demand upon the Board would substantially delay the estimated time for a hearing.

[212] § 1389(I).

An employer has this period of time to prepare the list of eligible employees. Upon receipt of this list, the Board must transmit it to the interested unions. If the list were immediately transmitted, an election might reasonably follow within four or five days. Some time must elapse between the union's acquisition of the list and the election to allow for the union's communication with the eligible voters and verification of the accuracy of the list.[213] Without some time for these activities, workers cannot be assured of an opportunity to hear all viewpoints.

At this juncture, however, the five week period of substantial employment has long since expired and the workers have dispersed to new jobs. An election which includes a substantial number of the employer's workers cannot be held. Thus, indulging all reasonable assumptions which the State has advanced to claim that the Act's election procedures do not frustrate employees in their designation of a collective bargaining representative, analysis of the Act's election procedures reveals, as the District Court found, an unavoidable, and unjustified, delay which destroys such a designation of a collective bargaining representative during the period when substantial numbers of employees are employed.

In these circumstances, the Arizona Legislature has chosen to channel all contested claims for recognition by a labor organization through the Act's unworkable election

[213]In *Excelsior Underwear, Inc., supra,* 156 N.L.R.B. 1236, 61 L.R.R.M. 1217, the N.L.R.B. considered the various reasons why a pre-election list of names and addresses of employees was necessary to insure a free and fair election. The Board recognized the importance of the list in allowing a union to expose the worker to its viewpoints (*Id.,* 156 N.L.R.B. at 1240-41) and to investigate the accuracy of the list. *Id.,* 156 N.L.R.B. at 1243.

procedures.[214] While prior to enactment of the AERA a labor organization could utilize concerted economic action to compel recognition,[215] this right was supplanted by the statutory necessity for election certification. Appellees do not contend that this replacement *per se* violates any constitutional provisions; however, when viewed in the context of Arizona agriculture and its effect on associational interests and Arizona's stated policy favoring collective bargaining, exclusive reliance upon the election procedures set forth in the Act cannot be constitutionally justified.

The undisputed evidence before the District Court reveals the highly seasonal nature of major agricultural crops in Arizona. As the Court found, the length of harvest seasons varies from three or four weeks in cantaloupes, lettuce and grapes to ten or eleven months for citrus and green onions; the short harvest period is the rule rather than the exception. Even in the crops with longer harvest seasons, employees do not spend the entire season with one employer. Work with any one employer is intermittent.[216]

As noted above, short seasons and frequent changes in employers impart substantial difficulties to an election-

[214]§ 1385(B)(12).

[215]Unquestionable is a labor organization's right to engage in concerted economic action for recognitional purposes where regulation of labor relations has not been enacted. *See, generally, American Foundaries v. Tri-City Central Trades Council, supra,* 257 U.S. 184, 209; *N.L.R.B. v. Jones & Laughlin,* 301 U.S. 1, 33 (1937); *Texas & New Orleans R. R. Co. v. Brotherhood of Railway & Steamship Clerks,* 281 U.S. 548, 570 (1930); Witte, *Early American Labor Cases,* 35 Yale L. J. 825 (1926). Arizona has implicitly recognized this right through its adoption of a "little Norris-LaGuardia Act" (A.R.S. § 13-1808 (West's 1971)) which limits the jurisdiction of the State's courts to issue injunctions in labor disputes. *Cf.,* § 1395(a).

[216]A. 471-72. With regard to intermittent employment in citrus, see A. 371-72 and § 1382(2).

based recognition procedure. Without substantially expedited procedures, a large number of employees terminate their employment prior to the opportunity to vote for a collective bargaining representative. Mr. Lubin, with extensive experience in another short-term industry noted that the experience of construction unions under NLRA procedures had resulted in the abandonment of the election as a vehicle to secure recognition.[217] Similarly, Mr. Cherry, the State's expert with extensive experience in Arizona labor relations, was hardput to recall a circumstance in which election procedures had been utilized to resolve representation issues in agricultural packing sheds.[218] The experience under the Act confirms these observations. At the Cactus Ranch, Teamsters Local 274 filed a petition for certification on November 22, 1974, when seventy-two workers were employed in the lettuce harvest.[219] During the following two weeks, a minimum of sixty-one employees were working.[220] However, the Board did not schedule a hearing until December 3, 1974, and the election was directed for December 17, 1974. At this time, the company had finished its harvest and no employees remained.[221] The election petition was withdrawn. The Act had served the purpose for which Appellees submit it was intended.

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[217]R. 371-73.

[218]A. 452-53. Mr. Cherry testified as follows:

> Q. Can you tell us generally when these elections [in seasonal industries] occurred that you are referring to?
> A. Well, they occurred some time between 1956 and 1973.
> Q. Can you be more specific than that?
> A. I sure couldn't.

[219]Enforcement Stipulation, at Item 5; A. 83-84; Seasonality Stipulation, A. 229-30.

[220]A. 229-30.

[221]*Id.*

The changed acceptance of labor unions since their rather hostile reception upon first appearance does not obscure their continuing primary purpose as recognized by this Court in *American Foundaries:* the advancement of the individual's welfare through joint action leading to collective bargaining with an employer.[222] *American Foundaries v. Tri-City Central Trades Counsel, supra,* 257 U.S. at 209. Deprived of the ability to negotiate with an employer, a labor union loses its basic purpose. Without some opportunity to negotiate jointly with an employer, workers have little incentive to associate together in unions. Any statute restricting the possibility of workers' collective negotiation with an employer necessarily frustrates the associational interests of the workers.

The AERA's representation procedures operate to work such a frustration. The Arizona Legislature has denied agricultural unions all methods of recognition other than an election procedure. And, the election procedure serves, in the majority of instances, to deny agricultural employees the opportunity to express a preference for a collective bargaining representative. Not only are the classes of workers deemed competent to participate in representation proceedings narrowly stated, but the pre-election procedural requirements found both in the Act and under the AERB regulations preclude the holding of an election during the period when a substantial number of the workers are present. In effect, then, the Act significantly restricts workers' efforts to designate a collective bargaining representative.

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[222]*See also,* Taylor and Witney, *Labor Relations Law,* 3 (1971).

Since the explicit recognition of constitutional protection for associational interests, union activities have stood under the umbrella of constitutional protection. *E.g., United Mine Workers v. State Bar of Illinois,* 389 U.S. 217, 221-22 (1967); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 5 (1964). Under the principles defining the right of association, a statute becomes constitutionally suspect when it constitutes "a 'substantial restraint' and a 'significant interference' with the *exercise* of the constitutionally protected freedom of association." *Kusper v. Pontikes, supra,* 414 U.S. at 58 (footnotes omitted; emphasis added). Thus, a political group deprived, with no justification, of use of university facilities utilized by other groups has been unconstitutionally interfered with. *Healy v. James,* 408 U.S. 169 (1972). A statute restricting the right to vote of a member of a political party defeats the member's associational interests. *Kusper v. Pontikes, supra.*

Under these principles, a statute substantially restricting workers' association for the purpose of collective bargaining must fall before the constitutional freedom of association. The Act works such a restriction, for it effectively frustrates employee efforts to secure recognition of a collective bargaining representative. The Arizona Legislature's policy purportedly protecting farmworkers' right to organize is illusory.[223] The AERA's representation sec-

[223]Statutory denials of the Act's declaration of policy riddle the Act. For example, § 1394 limits the AERA "only to such persons, *labor organizations* or activities as are not within the jurisdiction of the National Labor Relations Act. . . ." (Emphasis added.) Of the two unions involved in agriculture, only the United Farm Workers is a labor organization not within the jurisdiction of the NLRA. The Legislature thus intended that the Act's substantive and procedural restrictions on labor organizing should apply only to the United Farm Workers.

tion was correctly found by the District Court constitutionally infirm.

C. Even If Certified, A Union Faces Extensive And Unjustified Limitations Upon The Scope Of Effective Collective Bargaining, Limitations Which Restrict The Right of Association.

The unrelenting restriction upon effective assertion of associational interests in the AERA's recognition provisions is repeated in the Act's substantive regulation. Eschewing the experience under the NLRA, which provides ready guidance in weighing the Act's impact upon collective bargaining, the AERA consistently extends prerogatives to management while suffocating workers' rights to advancement of wages, hours and working conditions through negotiation.[224] Without the opportunity to negotiate a meaningful collective bargaining agreement, a union stands stripped of its basic purpose.

The Act constructs detailed areas of labor-management relations immunized from union intrusion. Sections 1384, 1385(B)(11) and 1385(D) establish "management rights" which a union cannot effectively raise in negotiations. Section 1385(D) permits an agricultural employer to refuse to bargain over management rights, a term expansively defined to include, *inter alia*, discharge of employees, subcontracting of work, selection of the methods to be used in production, time of work, size and make-up of crews, places of work and hiring, suspension and transfer of

[224]§ 1381.

workers.[225] Section 1385(B)(11) significantly buttresses an employer refusal to negotiate by making it a crime and an unfair labor practice for a union to "intimidate, restrain or coerce [an] employer[]" with regard to any of the management rights defined by Section 1384. Under this language, not only would a strike, boycott or threats thereof, over such management rights be unlawful, but subject to restraint by an injunction.[226] A union negotiator is forced to walk a tightrope between permissible subjects of bargaining and management rights, for any threat of economic action linking a permissible subject with a management right would expose the negotiator to criminal sanctions.

The debilitating effect of the management-rights limitation on bargaining to a union and its members can be easily illustrated. Section 1384(2) reserves to the employer the right "to hire, suspend, discharge or transfer employees in accordance with his judgment of their ability." Under this language, a union cannot insist upon a collective bargaining agreement containing a requirement of "just cause" for dismissal or seniority as a basis for job assignment. The effect of reserving to an employer the absolute power to discharge employees is "to discourage, if not forbid, any presentation of the discharged employee's grievances to [the employer] through a labor organization or his chosen representative, or in any way except personally." *National*

[225] § 1384(1) and (2). The "management rights" defined in § 1384 are obviously intended as subjects upon which a Union cannot bargain without the employer's acquiesence. § 1384(3) specifically notes the interrelationship of § 1384 and § 1385(d) [duty to bargain].

[226] §§ 1393(A) and (B).

Licorice Co. v. N.L.R.B., 309 U.S. 350, 360 (1940). The Act's management rights section thus affirmatively restricts the purposes for which workers can associate together in a union.

The evils of the labor contractor system of employment prevalent in agriculture forced Congressional regulation of labor contractors.[227] Workers are kept inpecunious to maintain the contractor's dominion and housed in isolated facilities with only the contractor to provide for their needs. Clearly, in such circumstances, workers would view collective action through a union as a means to rid themselves of the debilitating restrictions worked by labor contractor system. The Act nonetheless denies farmworkers the opportunity to bargain hard over this obviously fundamental issue. The management rights stated in the Act include absolute employer control of the hiring of employees.[228] A union could not urge a hiring hall or procedures as the means by which employees should be hired, for the employer can refuse to bargain over any issue related to hiring. Such examples as hiring and discharge focus the burdens placed on a union negotiator by the Act.

If a union negotiator presses the interests of the employees he represents and bargains vigorously over matters included within the Act's definition of management rights, he places himself in peril. If his discussions might be characterized as a threat to engage in economic action over such matters, the other procedures of the Act intertwine to place that negotiator in an extremely dangerous position.

[227] Farm Labor Contract Registration Act, 7 U.S.C. § 2041 *et seq.*

[228] § 1384(2).

Criminal sanctions could come into play.[229] An employer also could apply, without notifying the union or the negotiator, to the superior court for an injunction to restrain such discussions.[230] A negotiator for a union, sitting in a room and negotiating a contract, could thus be served with an injunction against his bargaining conduct. This stands as a spectre confronting any union negotiator under the AERA. The intimidation worked by this possibility of an employer injunction or criminal sanctions can be readily appreciated; the Act serves the purpose of insuring that union negotiators will only timidly present workers' interest.[231]

A union demand for negotiation in many subject areas would make the negotiator subject to intimidation through the Act's procedures. Discharge and hiring are not the only subject matters reserved to the exclusive province of the grower. Assignment of work, subcontracting, and crew size are but a few of the subjects which are of obvious concern to workers, but which a union cannot pursue at the bargaining table or through concerted economic action; the Act's expansive definitions of "management rights" (Sections 1384 and 1385(D)) suggest there are many others unstated in the Act. Without the ability to raise such issues, workers are able to find little to be realized through associating together. The Act's extensive reservation to growers of management rights effectively means that a

[229] §§ 1385(B)(11), 1392.

[230] §§ 1385(B)(11), 1393.

[231] This result is far distant from the right to bargain collectively which the Act purports to extend to agricultural employees. At the Mad Hatter's tea party, in *Alice in Wonderland*, the March Hare asks Alice if she would care for some wine. When she replies that she would, he tells her there isn't any. Lewis Carroll, *Alice in Wonderland*, Norton & Company, 1971, p. 54.

worker's employment depends solely upon the good will of the grower, not the protections of a collective agreement. Similarly, a union has little to offer the worker as benefits of unionization; effectively censored at the bargaining table and prohibited from encouraging economic action, the union can do little to advance the interests of the workers.

The importance to a union of many of the issues insulated from bargaining by the various "management rights" was amply illustrated at trial. The witnesses showed that a union deprived of the right to negotiate over subjects defined as management rights would offer few attractions to a worker. Mr. Lubin, an attorney with extensive experience in labor-management relations, commented upon the effect of exclusion from the negotiating table of crew size and make-up and assignment of work:

> Well, it would—the employees would become more questioning of the benefits they can obtain by joining a union: what good can you do for me; you can't talk about how many people do how much; they can still force me to do all this kind of extra work; you can't do anything about it. They become more and more apathetic, more and more apprehensive, . . . and they would tend not to associate with fellow employees who might want to belong to the union. (A. 433-34.)

Faced with the prohibition on bargaining over discharge, Mr. Chavez noted the effect:

> It would be very difficult to demonstrate to the workers the use and need of a union. We couldn't do anything about a worker being discharged. . . . I have grave doubts that the workers would be interested in a union. (A. 391.)

The Act even incorporates substantial limitations upon the right of unions to bargain regarding the wages to be paid employees. Section 1385 (B)(5)(a) makes bargaining over the payment or delivery of "any money or thing of value for services which are not performed or are not to be performed" illegal.[232] This radical rewriting of the NLRA provision after which Section 1385(B)(5)(a) was patterned prohibits the discussions of severance pay, vacations, holidays, sick-leave, paid rest periods, reporting or stand-by time or travel time, to name a few. Although the AERB has attempted to rehabilitate this section by regulation,[233] such issues as severance pay, paid rest periods and witness and jury duty pay are totally excluded from the bargaining table.

The Act thus impinges upon a union's ability to negotiate over matters fundamentally intertwined with basic worker concerns: job security, seniority, and pay, to name

[232] § 1358(B)(5)(a) is patterned after § 8(b)(6) of the NLRA (29 U.S.C. § 158(b)(6)) which makes it an unfair labor practice for a labor organization or its agents ". . . to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, *in the nature of an exaction*, for services which are not performed or not to be performed." (Emphasis added.) The language of the Act deletes the emphasized portion of § 8(b)(6): "in the nature of an exaction." The consequence of this deletion is wide-ranging. This language was included by Congress in the NLRA to make clear that only featherbedding demands were to be illegal; such issues as rest periods, jury pay, severance pay, etc. were not to be included. For the background and purpose of § 8(b)(6), *see, American Newspaper Publishers Assn. v. N.L.R.B.*, 345 U.S. 100, 111, n. 10 (1953); *American Newspaper Publishers Assn.*, 86 NLRB 951, 25 LRRM 1002 (1949); 93 Cong. Rec. 6603, 2 *Leg. Hist. of the LMRA* 1545 [debate between Senators Taft and Pepper]; 93 Cong. Rec. 1001-02, 2 *Leg. Hist. of the LMRA* 1623-24.

[233] Reg. R4-207(A) provides as follows:

> Section 23-1385(B)(5)(A) [sic] of the Act shall not include as an unfair labor practice the payment of money or other things of value for show-up time, holiday pay, or vacation pay.

a few. And, although employer-union negotiations may proceed on permissible subjects, the AERB stands with little power to review an employer's conduct to determine whether he is negotiating in good faith as required by Section 1385(D). The Board cannot look to the refusal or failure of the employer to agree to a proposal or to the making of a concession as a basis upon which to find "bad faith". Yet, the NLRB recognizes the unwillingness of an employer to make concessions as representing an important indication of "bad faith" bargaining, for, as Justice Frankfurter, concurring and dissenting in *N.L.R.B. v. Truitt Manufacturing Co.*, 351 U.S. 149, 154 (1956), noted, "[good faith] is inconsistent with a predetermined resolve not to budge from an initial position." The AERB is statutorily precluded from considering such a resolve in its determination of whether an employer is negotiating in "good faith". The Board could not look at an employer's refusal to accept a union proposal, even if the union suggested a previous employer proposal, as an indication of "bad faith" bargaining. *Compare, Texas Coca-Cola Bottling Company*, 146 NLRB 420, 429, 55 LRRM 1326 (1964).

The AERA's substantial restrictions upon the scope of collective bargaining frustrate a primary purpose for which workers join together in unions: The negotiation of an agreement regarding wages, hours and working conditions. This effect causes a significant impingement upon the right to associate, for these restrictions lessen the effectiveness of a union and its desirability to workers. Without the right to bargain about key issues relating to wages and worker security, an association for bettering the terms and conditions of employment loses all attractiveness. Although these

restrictions upon collective bargaining may only indirectly affect farmworkers' associational interests, this Court has recognized that the right of association constitutionally protects against the indirect, as well as direct, interference with associational activities. *E.g., Healy v. James, supra,* 408 U.S. at 183; *N.A.A.C.P. v. Alabama, supra,* 357 U.S. at 461.

VIII.

ABSOLUTE DENIAL TO THE AERB OF DISCRETION TO REQUIRE THAT AN AGRICULTURAL EMPLOYER FURNISH MATERIALS, INFORMATION, TIME OR FACILITIES TO ENABLE A LABOR UNION TO COMMUNICATE WITH FARMWORKERS IS UNCONSTITUTIONAL.

Section 1385(C) mandates, *inter alia,* that "no employer shall be required to furnish . . . materials, information, time, or facilities to enable . . . [a] labor organization . . . to communicate with employees of the employer . . . ." In the agricultural setting, where growers often own the fields in which farmworkers toil, the labor camps where they live, and the buses which transport them from one to the other, this rule closes off all channels of communication between a union and farmworkers.[234] A restriction of such

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> [M]any farmworkers are migrants; they arrive in town in time for the local harvest, live in motels, labor camps, or with friends or relatives, then move on when the crop is in. Obviously home visits, mailings, or telephone calls are impossible in such circumstances . . . . [E]ven those farmworkers who are relatively sedentary often live in widely spread settlements, thus making personal contact at home impractical because it is both time-consuming and expensive.
>
> Nor is pamphleting or personal contact on public property adjacent to the employer's premises a reasonable alternative in the present context, on several grounds. To begin with, many ranches have no such public areas at all: . . . the cultivated fields begin at the property line, and across that line is either an open highway or the fields of another grower. Secondly, the typical industrial scene of a steady stream of workers walking through the factory gates to and from the company parking lot or nearby public transportation rarely if ever occurs in a rural setting. Instead, the evidence showed that labor contractors frequently transport farmworkers by private bus from camp to field or from ranch to ranch, driving directly onto the premises before unloading; in such circumstances, pamphleting or personal contact is again impossible. Thirdly, . . . a significant number of farmworkers read and understand only Spanish, Filipino, or other languages from India or the Middle East. It is evident that efforts to communicate with such persons in the local media are futile. Finally it was also shown that many farm workers are illiterate, unable to read even in one of the foregoing languages; in such circumstances, of course, printed messages in handbills, mailings, or local newspapers are equally incomprehensible. (*A.L.R.B. v. Superior Court of Tulare County,* 16 Cal. 3d 392, 415-16, 546 P. 2d 687, 128 Cal.Rptr. 183 (1976), *appeal dismissed,* 429 U.S. 802 (1976).)

See also, *Migrant and Seasonal Farmworker Powerlessness, Hearings Before the Subcomm. on Migratory Labor of the Sen. Comm. on Labor and Public Welfare,* 91st Cong., 1st & 2nd Sess. (1970); Parts A & B; "The Unionization of Farm Workers: Background and Alternative Federal Approaches", Burton, *Congressional Research Service* (June 6, 1977) Multilith No. 77-88 E, pp. 3-15.

Based on testimony and stipulations, the District Court found:

> Therefore, the work is intermittent and employees often must leave an area immediately after a harvest to find other employment. Many employees do not return to the same employer in a following year so that each year there is a substantial change in the work force. (A. 472.)

Furthermore, the Court considered testimony and also took judicial notice of living and working patterns in agriculture, facts commonly known in every major State of the migrant stream, and found that:

> Much of the work of reaching agricultural employees must be done on the employer's property, since most agricultural employees are migrants with no permanent residence in the area and live in labor camps on the employer's premises. (A. 474.)

Judicial notice of these facts was proper and supports the lower court's conclusion that § 1385(C) is unconstitutional as applied in agriculture. *See, e.g., Contractors Ass'n of Eastern Pa. v. Sec'y of Labor,* 311 F.Supp. 1002 (E.D. Pa, 1970) [conditions in the building industry are common knowledge and may be judicially noticed];

breadth impermissibly infringes precious First Amendment rights.

While insulating *ALL* property, both fields and camps, from union access, Section 1385(C) also prohibits the AERB from requiring *ANY* "information" or "materials" which might enable a union to communicate with farmworkers. Translated into practical terms, this means that an employer cannot be required to give out post office boxes or home addresses, even for employees who live off company property. The only information which an employer must produce is the names of his employees ten days after direction of an election.[235] While an employer must turn over a list of employee names, he need not provide information which would enable a union to contact those workers, and can keep the union from entering his fields or labor camps to request such information from the workers themselves. Thus, all avenues of access are closed.

The effect of Section 1385(C) is to eliminate effective communication between unions and farmworkers. The right to *speak* out on labor issues (*Thornhill v. Alabama, supra,* 310 U.S. 88), and the right to *hear* such speech (*Virginia St. Bd. of Pharmacy v. Virginia Citizens' Council, supra,* 425 U.S. 748), are both decimated to impose a sanctuary of private property rights. This the State may not constitutionally do. *Marsh v. Alabama,* 326 U.S. 501 (1946).

In the labor context, this Court has recognized that in order to exercise the right to organize granted by the NLRA, unions must be able to communicate effectively with

Ponce v. Housing Auth. of Tulare County, 389 F.Supp. 635 (E.D. Cal., 1975) [court may take judicial notice of fact that farmworkers receive substantially less income than average American family]; *Crawford v. Davis,* 249 F.Supp. 943 (E.D. Pa., 1966), *cert. den.* 383 U.S. 921 [inherently mobile nature of military life may be judicially noticed].

[235] § 1389(I). See fn. 16, *infra.*

workers about the advantages of unionization. *N.L.R.B. v. Babcock & Wilcox,* 351 U.S. 105 (1956). In fact, "when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." *Id.,* 351 U.S. at 112.[236]

These principles have been applied with particular immediacy to agriculture where employers often own both the work-place and the living quarters. "A labor housing facility is not the equivalent of a prison isolation block, impervious to visitation," (*U.F.W. v. Superior Court*), *supra,* 14 Cal.3d 902, 910, 122 Cal.Rptr. 877, 537 P.2d 1237), and residents do not lose their basic right to receive information, including facts about labor organizing, merely because the landlord is also the employer.[237] Applying the rationale of *Marsh v. Alabama, supra,* 356 U.S. 501, to labor

[236] Although Appellants appear to embrace *Babcock,* they refuse to recognize how completely the AERA ignores the very foundations of *Babcock.* While ostensibly granting farmworkers the right to organize, the AERA renders that right nugatory by eliminating all possibility for effective communication between unions and farmworkers.

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> "To the average person, it is inconceivable that his landlord would have the right to determine who shall, and who shall not be able to visit his home. But in the name of property rights, some owners of migrant labor camps presume to bar all outsiders whom they, in their sole discretion, determine should [not] be allowed to see the residents of the camp. In this way, they keep out not only just peddlers, but union organizers, priests, and ministers, poverty program workers, lawyers, and so called do gooders, who they think might in some way interfere with the docility of their captive work force." (*Subcomm. Report of the Comm. on Labor and Public Welfare on Migratory Labor, The Migratory Farm Labor Problem In the U.S.,* 90th Cong., 2d Sess., as extended, p. 49 (1969).)

camps, leads to the conclusion that protection of constitutional free speech requires, at a minimum, some access to labor camp residences.

The *Marsh* decision, recently reaffirmed in *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976), rests upon the premise that where private property functions as a residential community, the residents' right to speak about or receive information on religious, political, or economic issues is protected by the First Amendment, despite private title. Labor camps are no less residential than Chickasaw, Alabama, the company town in *Marsh*. That a camp owner may or may not provide the security protection or sewage disposal available in Chickasaw is, therefore, immaterial to the application of First Amendment protections. *Peterson v. Talisman Sugar Co.*, 478 F.2d 73 (5th Cir., 1973); *U.F.W. v. Mel Finerman*, 364 F.Supp. 326 (D. Colo., 1973); *Franceschina v. Morgan*, 346 F.Supp. 833 (S.D. Ind., 1972); *Folgueras v. Hassle*, 331 F.Supp. 615 (W.D. Mich., 1971). A denial of camp residents' right to receive information, such as that found in Section 1385(C), is just as complete and constitutionally repugnant as in the company town in *Marsh*.

Implicitly conceding that a complete denial of access to property of an agricultural employer would be constitutionally impermissible, Appellants assert that Section 1385 (C) "does not mean that an employer in all cases may deny access to his property."[238] However, the statutory language clearly eliminates any power of the AERB to require access.[239]

[238]Brief for the Appellants, at 41.

[239]Appellants argue that "facilities" does not include real property, implying the AERB could require access to real property but not to buildings. Even assuming the validity of this argument, the AERB is prohibited from demanding the "time" necessary to allow a union to take access to such property, indirectly but effectively closing off that channel of communication too. Furthermore, Arizona trespass laws preclude entrance onto private property by union supporters or organizers. Whether or not "facilities" includes real property, employers can and do use state trespass laws to prevent union access to real property.

Taking the opposite approach and citing *N.L.R.B. v. Babcock & Wilcox, supra*, 351 U.S. 105, Appellants argue that access to an employer's property may be completely denied so long as there are other channels of communication open. Brief for the Appellants, pp. 69-72. The argument does not go far enough—for the critical inquiry remains: *where no reasonable alternatives exist, can the State prevent its labor board from ordering access to an employer's property. Babcock* held that where no reasonable alternatives for communication between unions and workers exist, private property must give way to free speech, and the proper accommodation between these two interests rests with the labor board. *Id.*, 351 U.S. at 112.

Denial to the AERB of discretion to require access to an agricultural employer's property where necessary in order to preserve First Amendment rights as well as the right to organize under the AERA, and limitation upon the information obtainable from employers which might enable a union to communicate with farmworkers impose overbroad and intolerable restrictions on Free Speech in the agricultural labor context.

IX.

THE AERA'S IMPOSITION OF WIDESPREAD RESTRAINTS UPON THE EXERCISE OF FUNDAMENTAL RIGHTS BY SOME FARMWORKERS BUT NOT OTHERS WHO ARE SIMILARLY SITUATED, THROUGH A RELATIONSHIP TO THE STATED OBJECTIVES OF THE STATUTE, VIOLATES THE EQUAL PROTECTION CLAUSE.

As is discussed in other parts of this Brief, numerous provisions of the AERA place restrictions on strikes, picketing, handbilling, and oral conversations within the ambit of First Amendment protections.[240] These broad restrictions apply to some farm workers and not to others, based upon distinctions which bear no relation to any legitimate state interest. For example, under Section 1382(1) of the AERA, employees engaged in hauling and stitching operations, and employees engaged in packing operations outside of the field are not included in the definition of "agricultural employee".[241] These distinctions are not based on any legitimate objectives of the law, and for this reason deny to farm workers who pick and pack in the field equal protection of the law.

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[240] *See*, Parts IV, V, and VI, *supra*.

[241] "[T]he function of 'stitching' referred to in § 1382(1)(g), is the assembling of cartons in which produce is to be packed. This function, which occurs during the harvest, generally occurs on the back of a truck or wagon (in the field) and sometimes occurs at a location or facility away from the field and away from the farm. The function of 'hauling' referred to in § 1382(1)(g) is the transporting of produce after it has been harvested. The function of packing agricultural produce may occur in the field or in a shed or facility on or off the farm." (*Stipulation*, in Pre-Trial Order, A. 64.)

The avowed purpose of the restrictions imposed by the AERA is to ensure "the uninterrupted production, packing, processing, transporting, and marketing of agricultural products." Section 1381. This purpose provides no basis for distinguishing between pickers and workers who pack in the field, on the one hand, and haulers, stitchers, and packing shed workers on the other, in terms of the regulation of concerted activity in agriculture. Undisputed testimony established that a strike by haulers and stitchers, or one by packing shed workers, can have the effect of stopping all work in the fields.[242] Yet, the Act pointedly excludes these workers from its reach.

In argument to the court below, the only state interest which Arizona has raised in support of these classifications is the suggestion that the exempted workers are covered by the National Labor Relations Act so that coverage under the AERA is preempted. Quite simply, the law is well established that many of these employees are not covered by the NLRA. See, e.g., *Bodine Produce Company*, 147 NLRB 832, 56 LRRB 1276 (1964); *D'Arrigo Bros. of California*, 171 NLRB 22, 68 LRRM 1013 (1968); *Dofflemeyer Bros. v. N.L.R.B.*, 206 F.2d 813 (9th Cir., 1953). The State's erroneous argument is certainly not a compelling state interest for the classifications the Act incorporates.[243]

A distinction drawn by a statute which affects fundamental rights is invalid unless supported by a *compelling*

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[242] A. 391-96.

[243] The Arizona legislature could easily have provided for the definition of "employee" under the Act to stop where NLRA jurisdiction begins. The California Agricultural Labor Relations Act defines "agricultural employee" in this manner. *See*, California Labor Code, § 1140.4(b).

state interest. *Shapiro v. Thompson, supra,* 394 U.S. at 634. The rights of expression and association guaranteed by the First Amendment are fundamental rights for equal protection purposes. *Williams v. Rhodes,* 393 U.S. 23 (1968); *Police Dept. v. Mosely, supra,* 408 U.S. 92; *San Antonio School District v. Rodriguez,* 411 U.S. 1, 34-35 (1973).

In its selective application to a portion of the farm labor population, the AERA compares to ordinances invalidated in *Police Dept. v. Mosley, supra,* 408 U.S. 92 and *Grayned v. City of Rockford,* 408 U.S. 104 (1972). The ordinances forbade picketing in certain locations, but specifically excepted labor picketing. This Court invalidated the ordinances, without reaching the issue of whether the restrictions imposed on picketing in themselves exceeded First Amendment requirements, on the grounds that the ordinances discriminated among pickets. Similarly, with no compelling interest the AERA discriminates among those allowed to engage in picketing and in a plethora of other forms of free expression.

Indeed, the selective application of the AERA to different categories of farm workers fails even the "rational basis" test. Under the less stringent equal protection test applicable where no fundamental interest or suspect classification is involved, the relationship between the distinctions drawn by the legislation and its objectives are examined for their rationality. *Eisenstadt v. Baird,* 405 U.S. 438, 447-48 (1972); *United States Department of Agriculture v. Moreno,* 413 U.S. 528, 534-3 (1973).

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (*Reed v. Reed,* 400 U.S. 71, 76 (1972).)

The distinctions made in the application of the AERA to farm workers fail this test, since the selective regulation of union activities bears no relation to the Act's purposes.

By broadly restricting free expression and associational rights of some farm workers, and placing no restrictions on other farm workers, for no compelling state interest, the AERA denies equal protection of the laws to those workers within its coverage.

X.

THE AERA IS AN OVERBROAD AND VAGUE CRIMINAL STATUTE SUSCEPTIBLE OF SWEEPING AND IMPROPER APPLICATION WHICH FAILS TO ADEQUATELY DEFINE UNLAWFUL CONDUCT.

Section 1392 of the AERA imposes criminal penalties upon any person who violates any provision of the Act.[244] The District Court held that this Section transforms the entire Act into a criminal statute which, given the AERA's extensive prohibition and restriction of speech activities, creates an overbroad criminal regulation.[245] This conclusion correctly follows from this Court's long line of deci-

[244] § 1392:
> Any person who wilfully resists, prevents, impedes or interferes with any member of the board or any of its agents or agencies in the performance of duties pursuant to this article, *or who violates any provision of this article is guilty of a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than one year, or both.* [Emphasis added.]

[245] A. 464-65.

sions invalidating imprecise or sweeping criminal laws that intrude into the area of fundamental freedoms.

A principle of constitutional law for which this Court has demonstrated constant vigilance is that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *In Re Primus,* ..... U.S. ....., 98 S.Ct. 1893, 1905 (1978); *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967); *United States v. Robel, supra,* 389 U.S. at 270. Even in cases in which a legitimate governmental interest exists "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker, supra,* 364 U.S. at 488; *Elfbrandt v. Russel,* 384 U.S. 11, 18 (1966).

The danger with overbroad criminal statutes is that they gather within their sweep not only activity which the State may legitimately proscribe but also activity which it clearly cannot. As the Court said in *N.A.A.C.P. v. Button, supra:*

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, *but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute, susceptible of sweeping and improper application.* (371 U.S. at 432-33; Emphasis added.)

This Court recently reaffirmed the *Button* holding in *In Re Primus, supra,* where it held that while the State of South Carolina enjoyed a legitimate and broad power to regulate the practice of professions it could not do so

through broad prophylactic rules which improperly impose upon rights of expression and association. *Id.,* ..... U.S. ....., 98 S.Ct. at 1905-06 (1978). *See, Aptheker v. Secretary of State,* 378 U.S. 500, 514 (1964); *U.S. v. Robel, supra,* 389 U.S. at 265-66 (1967).

The AERA both ignores and fails this standard. Many provisions broadly restrict farmworkers' exercise of speech and associational rights, reflecting a rampant insensitivity to those rights and a lack of necessary effort to "regulate in this area only with narrow specificity." *Button, supra,* 371 U.S. at 433, quoted with approval in *In Re Primus, supra,* ..... U.S. ....., 98 S.Ct. at 1905.

The Act's restrictions suppress too broadly expressive conduct in the context of a labor dispute. *Thornhill v. Alabama, supra,* 310 U.S. at 102-03. Thus, it is made a crime subject to a year in jail and a $5,000 fine for a clergyman or housewife acting on behalf of the Union to entreat a store manager to discontinue selling agricultural produce, [246] or for a farmworker to make an inaccurate, deceptive, or untruthful statement while trying to persuade a consumer not to purchase that same produce.[247] Also subject to these penalties is the negotiator who bargains vigorously about many topics of vital concern to farmworkers[248] or the farm worker who continues to carry on informational picketing at a ranch after the employer has filed a petition for an election.[249] There are countless such "crimes" created by this section of the AERA as the Act

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[246] § 1385(B)(7).
[247] § 1385 (B)(8).
[248] § 1384; § 1385(B)(11).
[249] § 1385(B)(12)(c).

repeatedly imposes restraints upon widely recognized and accepted union activities.

This Court has recognized that statutes which indiscriminately encompass both activities protected and not protected under the First Amendment are inherently vague. *See, Shelton v. Tucker, supra,* 364 U.S. at 492, Frankfurter, dissenting; *Hynes v. Mayor and Council of Borough of Oradell,* 425 U.S. 610, 621-22 (1976). Such indefinite standards of guilt where First Amendment interests are involved must fall. As the District Court below noted:

> Considering the enormous variety of activities covered by the Act, and the fact that . . . many of these involve First and Fourteenth Amendment constitutional rights, it is clearly a statutory provision so vague that men of common intelligence can only guess at its meaning. Conduct can only be prohibited and punished by certain, clear statutes and such precision is necessary so that "the ordinary person can know how to avoid unlawful conduct." U.S. v. Sullivan, 332 U.S. 689, 68 S.Ct. 331, 92 L. Ed. 297 (1948). Even closer scrutiny is warranted where the regulation covers freedom of speech. Ashton v. Kentucky, 385 U.S. 195, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966). (A. 464-65.)

The State's suggestion that despite the overbreadth of the Act, farmworkers should await a case-by-case application in hopes that state courts might someday narrow the provisions to reach only legitimately proscribable conduct misconstrues the Constitution. This Court has repeatedly rejected such a treatment of overbroad criminal statutes.

> If there is an internal tension between proscription and protection in the statute, we cannot assume that in its subsequent enforcement, ambiguities will be resolved

> in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. *(N.A.A.C.P. v. Button, supra,* 371 U.S. at 438.)

See, Hynes v. Mayor and Council of Borough of Oradell, supra, 425 U.S. 610; *Aptheker v. Sec'y State, supra,* 378 U.S. at 516.

The State's only attempt to rebut the District Court's holding that the AERA is an overbroad and vague criminal statute is to claim "[s]ince the criminal provision has never been applied it is impossible to know what will be considered a 'violation.' "[250] The argument is both erroneous and revealing: erroneous because, as the District Court recognized, parties against whom a criminal statute is intended to operate need not await actual prosecution to challenge the statute (*Doe v. Bolton, supra,* 410 U.S. 179; *Steffel v. Thompson, supra,* 415 U.S. 452); revealing because this Court long ago established that it is the minimal requirement of a criminal statute that it enable "the ordinary person [to] know how to avoid unlawful conduct" (*U.S. v. Sullivan,* 332 U.S. 689, 693 (1948)), and that it cannot leave men of common intelligence guessing as to its meaning and differing as to its application. *Connelly v. General Construction Co.,* 269 U.S. 385, 391 (1926). A criminal statute that makes it impossible to know what is a violation obviously violates Due Process. *Cramp v. Board of Public Instruction,* 368 U.S. 278 (1961).

The District Court had no difficulty in determining the obvious overbreadth of the AERA created by Section 1392.

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[250] Brief for the Appellants, p. 37.

The State's hoped-for narrowing in future prosecutions of the Union and farmworkers is not the remedy established by this Court for parties like the Appellees who are subject to these penalties. This is especially so when fundamental First Amendment freedoms are suppressed. *See, Ashton v. Kentucky,* 384 U.S. 195 (1966); *Baggett v. Bullitt, supra,* 377 U.S. 360.

CONCLUSION

Appellees respectfully request this Court to affirm the judgment of the three-judge District Court based on the arguments presented in this brief.

Respectfully submitted,

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Appendices

Rule 65. Injunctions

65(a) Preliminary injunction; notice

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

Amended July 1, 1966, effective on and after midnight October 31, 1966.

65(b) Dissolution of preliminary injunction prior to final hearing prohibited; exception in case of verified answer. The defendant in an injunction proceeding may answer as in other civil actions but the preliminary injunction shall not be dissolved before final hearing because of a denial of the material allegations of the complaint unless the answer denying the allegations is verified.

65(c) Motion to dissolve or modify. Motions to dissolve or modify a preliminary injunction without determining

the merits of the action may be heard after an answer is filed, upon notice to the opposite party. If, upon hearing the motion, it appears that there is not sufficient ground for the injunction, it shall be dissolved, or if it appears that the injunction is too broad, it shall be modified.

65(d) Temporary restraining order: notice: hearing: duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice or the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters

of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Amended July 1, 1966, effective on and after midnight Oct. 31, 1966.

65(e) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the State or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

Amended July 1, 1966, effective on and after midnight Oct. 31, 1966.

65(f). Deleted. Effective Nov. 1, 1967.

65(g) Security on injunction restraining collection of money; injunction made permanent

1. Upon dissolution of a preliminary injunction or temporary restraining order restraining the collection of

money, if the action is continued over for trial, the court shall require the defendant to give security to be approved by the court, and payable to the plaintiff in the amount previously enjoined and such additional amount as the court requires, and conditioned upon refunding to the plaintiff the amount of money, interest and costs which may be collected by him in the action in the event a permanent injunction is ordered on final hearing.

2. If a permanent injunction is ordered on final hearing, the court shall, on motion of the plaintiff, enter judgment against the principal and surety giving the security for the amount shown to have been collected and to which the plaintiff appears entitled.

65(h) Form and scope of injunction or restraining order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance and shall be specific in terms. It shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained, and it is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

65(i) Writs of injunction; where returnable; several parties. Writs of injunction granted to stay proceedings in an action, or to stay execution of a judgment, shall be returnable to and tried in the court where the action is pending or the judgment was rendered.

65(j) Disobedience of injunction as contempt; order to show cause; warrant; attachment; punishment

1. Disobedience of an injunction may be punished by the court as a contempt.

2. When a party in whose favor an injunction has been issued files an affidavit that the party against whom the injunction was issued is guilty of disobeying the injunction and describes the acts constituting such disobedience, the court may order the person so charged to show cause at the time and place the court directs why such disobedient party should not be adjudged in contempt of the court which issued the injunction.

3. The order, with a copy of the affidavit, shall be served upon the person charged with the contempt within sufficient time to enable him to prepare and make return to the order.

4. If such person fails or refuses to make return to the order to show cause a warrant of arrest may issue directing the sheriff or any constable of the county where the alleged contemnor resides or may be found, to arrest him and bring him before the court at a time and place directed by the court, and he may be required to give bail for his attendance at the trial and his submission to the final judgment of the court.

5. If the alleged contemnor is a corporation, an attachment for sequestration of the property of the corporation may be issued upon refusal or failure to appear.

6. Upon the appearance of the alleged contemnor, or at the trial of the issue, the court shall hear the evidence, and if the person enjoined has disobeyed the injunction he may be committed to jail until he purges himself of the contempt as may be directed by the court or until he is discharged by law.

Appendix "B"

§ 23-1301.

1. "Labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment.

Appendix "C"

§ 23-1321. Definitions

In this article, unless the context otherwise requires:

1. "Labor organization" means an organization of any kind, or an agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment. For the purpose of this article the word "employee" or "employees" does not include persons having supervisory authority, professional or confidential employees, guards or persons employed in personnel departments.

2. "Person" includes a natural person, a corporation, association, company, firm or labor organization.

3. "Secondary boycott" means:

(a) A combination or conspiracy by two or more persons, by a strike, threat to strike, picketing, threat to picket, violence, threat of violence, or by concerted refusal or threat of concerted refusal, to process, install, service, handle, transport or otherwise deal with specified articles, materials or services, to force or require a person to cease or partially to cease processing, installing, servicing, selling, handling or transporting the products of or selling to or otherwise dealing with any other person for the purpose of forcing or requiring such other person to recognize, bargain with or comply with the demands of a labor organization, or for the reason that such other person has in his employ persons who are not members of a labor organization or is not himself a member of a labor organization, or

for the reason that such other person uses goods, materials or services considered objectionable by a labor organization.

(b) An act, combination or agreement which directly or indirectly causes, induces or compels another to strike, threaten to strike, picket, threaten to picket, commit violence, threaten to commit violence, refuse to or threaten to refuse to process, install, service, handle, transport or otherwise deal with specified articles, materials or services, to force or require a person to cease or partially to cease processing, installing, servicing, selling, handling or transporting the products of, or selling to or otherwise dealing with any other person for the purpose of forcing or requiring such other person to recognize, bargain with or comply with the demands of a labor organization, or for the reason that such other person has in his employ persons who are not members of a labor organization, or is not himself a member of a labor organization, or for the reason that such other person uses goods, materials or services considered objectionable by a labor organization.

Appendix "D"

In the Superior Court of the State of Arizona
in and for the County of Pima

The Agricultural Employment Relations Board, Plaintiff, vs. United Farm Workers of America, AFL-CIO, John and Jane Does, 1 thru 100, Defendants.	No. 153789 Temporary Restraining Order

The Court having read the verified Application for Temporary Restraining Order, and it appearing to the satisfaction of the Court that this is a proper case for granting a Temporary Restraining Order,

IT IS ORDERED that the Defendant, United Farm Workers of America, its officers, agents, servants, employees and representatives and all persons in active concert or participation with them are hereby until further order of this Court, restrained and enjoined from:

A. Conducting Secondary Boycotts as defined in A.R.S. 23-1385 (B)(6) and A.R.S. 23-1321 at Roy's Arizona Pharmacy, 647 S. 6th, Tucson, Arizona; Pueblo Liquor Store, 201 North Park, Tucson, Arizona; Fritz's Liquors, 1814 East 36th St., Tucson, Arizona; Market Spot, 937 E. Speedway, Tucson, Arizona; and Super City Department Stores, 505 E. 17th Street, Tucson, Arizona.

B. Attempting to induce, encourage, restrain, coerce, or otherwise interfere with executives or management of the aforementioned stores to make management decisions not to handle, sell or distribute Gallo Brand products in violation of A.R.S. 23-1385(B)(7).

C. Conducting picketing activities which consist of more than five (5) persons at one time at any one of the aforementioned stores.

D. Conducting picketing activities on the privately owned property of any one of the aforementioned stores, or which interferes, prohibits or otherwise obstructs the ingress and egress of the privately owned property of any of the aforementioned stores.

E. Conducting picketing activities at any one of the aforementioned stores which interferes, prohibits, obstructs, or otherwise violates the rights of any individuals who may either pass or enter the privately owned property of the aforementioned stores.

DONE IN OPEN COURT this 20th day of March, 1975.

Norman S. Fenton
Judge of the Superior Court

STATE OF ARIZONA
COUNTY OF PIMA } ss.

The foregoing instrument is a full, true, and correct copy of the original on file in this office.
Book 1472 Page 355

Attested Dec. 21, 1978
NORMA M. FELIX, Clerk

/s/ By B. J. Davis Deputy

Since this document is not a part of the trial record, a certified copy has been attached to the brief stamped "original".

Appendix "E"

State of Arizona

Before the Agricultural Employment Relations Board

The Agricultural Employment Relations Board, Petitioner, vs. Maricopa County Organizing Project, an Arizona corporation, and the United Farm Workers of America (AFL-CIO), Respondents.	Cases Nos. C10-317, C10-318, C10-319, C10-320, C10-321, C10-322, C10-323, C10-324, Consolidated No. C10-287 Plaintiff's Second Amended Complaint and Notice of Hearing

It having been charged in Cases No. C10-317, C10-318, C10-319, C10-320, C10-321, C10-322, C10-323, C10-324, consolidated into Case No. C10-287, by charging parties named in Paragraph 1 of Count I below, that Maricopa County Organizing Project (herein, M-COP), its officers, agents, servants, employees and representatives and all persons in active concert or participation with M-COP, has engaged in and is engaging in unfair labor practices as set forth and defined in the Agricultural Employment Relations Act, A.R.S. § 23-1381 through 23-1395 (herein called The Act) and,

The said charging parties, having additionally filed amended charges bearing Numbers C10-317A, C10-318A,

C10-319A, C10-320A, C10-321A, C10-322A, C10-323A, C10-324A, all of which have been consolidated into Case No. C10-287, that United Farm Workers of America, AFL-CIO (herein, the UFW), its officers, agents, servants, employees and representatives and all persons in active concert or participation with the UFW has engaged in and is engaging in unfair labor practices as set forth and defined in the Agricultural Employment Relations Act, A.R.S. § 23-1381 through 23-1395 (herein called The Act) and,

Bodine Produce Co., having also filed a charge, bearing No. C12-325, consolidated into Case No. C10-287, that said United Farm Workers of America, AFL-CIO, its officers, agents, servants, employees and representatives and all persons in active concert or participation with it has engaged in and is engaging in unfair labor practices as set forth and defined in the Agricultural Employment Relations Act, A.R.S. § 23-1381 through 23-1395 (herein called the Act), and

The undersigned having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, issues, pursuant to The Act and Section 4-240 of the Agricultural Employment Relations Board's (herein called the Board) Rules and Regulations, the following amended complaint and alleges as follows:

COUNT I

1. The charges in Consolidated Case No. C10-287 were filed by the charging parties, EverKrisp Vegetables, Inc., Tanita Farms, Inc., B & T Farms, Phoenix Vegetable Distributors, Jack Okabayashi Farms, George Matsumori, Davis Packing Co. and Triple T Farms, Inc. on October 29, 1977, and served upon M-COP on October 31, 1977.

2. M-COP is, and has been at al times material herein, a labor organization as defined in A.R.S. § 23-1382(7), 23-1301 and 23-1321.

3. At all times material herein, Guadalupe Sanchez, Jesus Romo, Michael Carey, Jose Ojeda, Daniel Morales and Harriet Cunningham, and Jane and John Does 1-500 have been agents of M-COP and acted on behalf of M-COP.

4. The charging parties as listed above are and have been at all times material herein agricultural employers as defined in A.R.S. § 23-1382(2).

5. From on or about October 27, 1977, and continuing to date, M-COP through its agents, in an attempt to force field workers to strike, has restrained, coerced, intimidated and threatened, including but not limited to Hermaina Delgado and Fernando Alvarez in the exercise of their rights as provided by A.R.S. § 23-1381, *et seq.,* more specifically in pertinent part, A.R.S. § 23-1383 A and B.

6. From on or about October 27, 1977, and continuing to date, M-COP through its agents, in an attempt to force field workers to strike, has threatened reprisal against the persons referred to in Paragraph 5 above, for the exercise of their rights as provided by A.R.S. § 23-1381, et seq., more specifically in pertinent part, A.R.S. § 23-1383 A and B.

7. From on or about October 27, 1977, and continuing to date, M-COP through its agents, in an attempt to force field workers to strike, has engaged in and caused injury to person and property and other violent conduct with the objective of preventing the preparing for market, trans-

porting, handling, displaying for sale, or selling of any agricultural products.

8. From on or about October 27, 1977, and continuing to date, M-COP through its agents, in an attempt to force field workers to strike, has intimidated, restrained and coerced agricultural employers in the exercise of their rights guaranteed to them by A.R.S. § 23-1384.

9. From on or about October 27, 1977, and continuing to date, M-COP through its agents, in an attempt to force field workers to strike, called a strike without first obtaining a majority vote of the employees within the bargaining unit to call a strike by secret ballot.

10. The actions referred to in Paragraph 5 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B1) of the Act, and subject M-COP to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act provided by A.R.S. § 23-1390 of the Act.

11. The actions referred to in Paragraph 6 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B2) of the Act, and subject M-COP to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act as provided by A.R.S. § 23-1390 of the Act.

12. The actions referred to in Paragraph 7 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B10) of the Act, and subject M-COP to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act as provided by A.R.S. § 23-1390 of the Act.

13. The actions referred to in Paragraph 8 above constitute an unfair labor practice as defined in A.R.S. § 12-1385(B11) of the Act, and subject M-COP to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act as provided by A.R.S. § 23-1390 of the Act.

14. The actions referred to in Paragraph 9 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B13) of the Act, and subject M-COP to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act as provided by A.R.S. § 23-1390 of the Act.

15. The actions of M-COP referred to in Paragraphs 5 through 9 above in connection with the operations of the agricultural employers as listed above, are contrary to the public interest of the State of Arizona as provided by A.R.S. § 23-1381 of the Act.

COUNT II

16. Plaintiff realleges all the allegations contained in Count I as if set forth fully herein.

17. The amended charges in Consolidated Case No. C10-287 were filed by EverKrisp Vegetables, Inc., Tanita Farms, Inc., B & T Farms, Phoenix Vegetable Distributors, Jack Okabayashi Farms, George Matsumori, Davis Packing Co. and Triple T Farms, Inc. on December 13, 1977, and served upon the UFW on or about December 15, 1977. Bodine Produce Co. filed its charge against the UFW on or about December 15, 1977.

18. The UFW is, and has been at all times material herein, a labor organization as defined in A.R.S. § 23-1382(7), 23-1301 and 23-1321.

19. At all times material herein, Guadalupe Sanchez, Jesus Romo, Michael Carey, Jose Ojeda and Daniel Morales, and Jane and John Does 1-500 have been agents of UFW and acted on behalf of the UFW.

20. The charging parties as listed above, are and have been at all times material herein, agricultural employers as defined in A.R.S. § 23-1382 (2).

21. From on or about December 8, 1977, and continuing to date, the UFW through its agents, in an attempt to force field workers to strike, has restrained, coerced, intimidated and threatened, including but not limited to Sean Naramore and Carlos Cabrera in the exercise of their rights as provided by A.R.S. § 23-1381, *et seq.*, more specifically in pertinent part A.R.S. § 23-1383 A and B.

22. From on or about December 8, 1977, and continuing to date, the UFW through its agents, in an attempt to force field workers to strike, has threatened reprisal against the persons referred to in Paragraph 21 above, for the exercise of their rights as provided by A.R.S. § 23-1381, *et seq.*, more specifically in pertinent part A.R.S. § 23-1383 A and B.

23. From on or about December 8, 1977, and continuing to date, the UFW through its agents, in an attempt to force field workers to strike, has engaged in and caused injury to person and property and other violent conduct with the objective of preventing the preparing for market, transporting, handling, displaying for sale, or selling of any agricultural products.

24. From on or about December 8, 1977, and continuing to date, the UFW through its agents, in an attempt to force field workers to strike, has intimidated, restrained and coerced agricultural employers in the exercise of their rights guaranteed to them by A.R.S. § 23-1384.

25. From on or about December 8, 1977, and continuing to date, the UFW through its agents, in an attempt to force field workers to strike, called a strike without first obtaining a majority vote of the employees within the bargaining unit to call a strike by secret ballot.

26. The actions referred to in Paragraph 21 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B1) of the Act, and subject the UFW to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act provided by A.R.S. § 23-1390 of the Act.

27. The actions referred to in Paragraph 22 above, constitute an unfair labor practice as defined in A.R.S. § 12-1385 (B2) of the Act, and subject the UFW to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act provided by A.R.S. § 23-1390 of the Act.

28. The actions referred to in Paragraph 23 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B10) of the Act, and subject the UFW to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act provided by A.R.S. § 23-1390 of the Act.

29. The actions referred to in Paragraph 24 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B11) of the Act and subject the UFW to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act provided by A.R.S. § 23-1390 of the Act.

30. The actions referred to in Paragraph 25 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B13) of the Act and subject the UFW to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act as provided by A.R.S. § 23-1390 of the Act.

31. The actions of the UFW referred to in Paragraphs 21 through 25 above in connection with the operations of the agricultural employers as listed above, are contrary to the public interest of the State of Arizona as provided by A.R.S. § 23-1381 of the Act.

PLEASE TAKE NOTICE that on the 10th day of January, 1978, at a time and place to be established, a hearing will be conducted before a duly designated Trial Examiner of the Agricultural Employment Relations Board on the allegations set forth herein, at which time and place you will have the right to appear in person or otherwise, and give testimony. Said hearing shall be conducted in accordance with Sections R4-257 through R4-267 of the Rules and Regulations of the Agricultural Employment Relations Board.

YOU ARE FURTHER NOTIFIED that, pursuant to Section R4-242 of the Board's Rules and Regulations, the Respondent shall file with the General Counsel, an original

and two (2) copies of an answer to the foregoing complaint within ten (10) days from the service thereof and that unless it does so, all of the allegations of the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

DATED at Phoenix, Arizona this 16th day of December, 1977.

William Gibney
General Counsel

Copies of the foregoing mailed to:

Maricopa County Organizing Project
c/o Caryl Preusch-Sanchez
Post Office Box 819
El Mirage, Arizona 85335

United Farm Workers
c/o Michael McCrory
Post Office Box 880
El Mirage, Arizona 85335

William Gibney

I hereby certify that the above document is a true and correct copy.

/s/ Maxine Olds
Administrative Secretary
My Commission Expires Apr. 4, 1982

Dated: December 21, 1978

Since this document is not a part of the trial record, a certified copy has been attached to the brief stamped "original".

APPENDIX "F"

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE AGRICULTURAL EMPLOYMENT RELATIONS BOARD, Petitioner, vs. UNITED FARM WORKERS OF AMERICA, AFL-CIO, Respondent.	NO. C361165 Temporary Restraining Order Pursuant to A.R.S. § 23-1390K and Order to Show Cause

Upon reading the Petition and the affidavits thereto filed by Petitioner in this action, and it appearing therefrom to the satisfaction of the Court that pursuant to A.R.S. § 23-1390K this is a proper cause for the issuance of a temporary restraining order and order to show cause; and that great and irreparable injury would result to Petitioner herein, and good cause appearing therefor,

IT IS THEREFORE ORDERED that the above-named Respondent appear before this Court, in Division No. 15 thereof, at 8:00 o'clock a.m., on the 5th day of January, 1978, then and there to show cause, if any, why it and its officers, agents, servants, employees, representatives and members, and all persons in active concert or participation with them, including, but not limited to, Guadalupe San-

chez, Jesus Romo, Michael Carey, Jose Ojedo, Juan Ojedo and Daniel Morales should not be restrained and enjoined during the pendency of this action from doing, directly or indirectly, by any means, method or device whatsoever, any of the following acts:

a. Obstructing or interfering with or attempting to obstruct or interfere with any free use, occupation and enjoyment of property of the charging parties by said charging parties, their agents, employees, customers, guests or invitees;

b. Obstructing in any manner any entrance or exit of the charging parties' premises;

c. Obstructing or interfering with the movement of any vehicle or person entering or leaving or attempting to enter or leave, or approaching or attempting to approach or departing or attempting to depart from the premises of any charging party;

d. Interfering with or obstructing the movement of any vehicle or person on sidewalks, roads, streets and highways abutting, leading to or adjoining the premises of any charging party;

e. Intimidating, threatening, molesting or coercing any of the charging parties or their agents, employees, prospective employees, customers, guests or invitees at any place or time;

f. Threatening or causing bodily harm to charging parties' employees, prospective employees, guests, invitees or any other person having business with the charging parties or the driver or operator of any vehicle attempting to enter, entering, attempting to leave or leaving the premises of any charging party or from

wilfully damaging or threatening to damage any property in or about said premises or on the public roadways near or adjacent thereto;

g. Placing, maintaining or stationing any more than a total of ten pickets or persons on or about any public road or public or private area immediately adjacent to any road which abutts the charging parties' property. For purposes of this order, picketing means standing, walking, sitting or otherwise congregating in any fashion whatsoever, with or without signs, at or near the property of any charging party. No picket or person shall stand, sit, walk or otherwise congregate within fifty (50) feet of any entrance of the property of any charging party.

h. Engaging in any conduct (including making any written or oral statement) which forces, threatens or coerces employees or prospective employees to strike or refrain from working or stop working on premises of the charging parties;

i. Entering upon the charging parties' property, picketing or maintaining or stationing any pickets or other persons on the property of any charging party or marching, standing, sitting, walking, driving or otherwise trespassing on said property;

j. Using any loudspeaker, broadcasting device or sound-amplification equipment within a distance of 150′ from employees of the charging parties or within a distance of 300′ of any dwelling, house or structure where any people dwell or reside, or using such devices or equipment under any circumstances prior to 6:30 A.M. or using more than one loudspeaker, broadcasting or sound-amplification device at any one time on any road or property immediately adjacent to any road abutting the charging parties' property;

k. Intimidating in any manner or threatening with bodily harm or injury or harassing, assaulting, pushing, striking or in any manner physically contacting any person, clothing or vehicle of any of the charging parties' employees, agents, customers, visitors, invitees, suppliers or other persons entitled to enter on their premises;

l. Shouting, yelling, uttering or using any loudspeakers or broadcasting device to utter words of profanity or opprobrium or making derogatory, obscene or abusive remarks or gestures so as to harass, intimidate or threaten or lead to a disturbance or result in any breach of peace.

IT IS ORDERED that, pending the determination of the above Order to Show Cause, or pending the further order of this Court, the Respondent and its officers, agents, servants, employees, representatives and members, and all persons in active concert or participation with them, including, but not limited to, Guadalupe Sanchez, Jesus Romo, Michael Carey, Jose Ojedo, Juan Ojeda and Daniel Morales, are hereby enjoined and restrained from doing directly or indirectly by any means, method or device whatsoever, any of the following acts:

a. Obstructing or interfering with or attempting to obstruct or interfere with any free use, occupation and enjoyment of property of the charging parties by said charging parties, their agents, employees, customers, guests or invitees;

b. Obstructing in any manner any entrance or exit of the charging parties' premises;

c. Obstructing or interfering with the movement of any vehicle or person entering or leaving or attempting to enter or leave, or approaching or attempting to ap-

proach or departing or attempting to depart from the premises of any charging party;

d. Interfering with or obstructing the movement of any vehicle or person on sidewalks, roads, streets and highways abutting, leading to or adjoining the premises of any charging party;

e. Intimidating, threatening, molesting or coercing any of the charging parties or their agents, employees, prospective employees, customers, guests or invitees at any place of time;

f. Threatening or causing bodily harm to charging parties' employees, prospective employees, guests, invitees or any other person having business with the charging parties or the driver or operator of any vehicle attempting to enter, entering, attempting to leave or leaving the premises of any charging party or from wilfully damaging or threatening to damage any property in or about said premises or on the public roadways near or adjacent thereto;

g. Placing, maintaining or stationing any more than a total of ten pickets or persons on or about any public road or public or private area immediately adjacent to any road which abutts the charging parties' property. For purposes of this order, picketing means standing, walking, sitting or otherwise congregating in any fashion whatsoever with or without signs, at or near the property of any charging party. No picket or person shall stand, sit, walk or otherwise congregate within fifty (50) feet of any entrance of the property of any charging party;

h. Engaging in such conduct (including making any written or oral statement) which forces, threatens or coerces employees or prospective employees to

strike or refrain from working or stop working on premises of the charging parties;

i. Entering upon the charging parties' property, picketing or maintaining or stationing any pickets or other persons on the property of any charging party or marching, standing, sitting, walking, driving or otherwise trespassing on said property;

j. Using any loudspeaker, broadcasting device or sound-amplification equipment within a distance of 150′ from employees of the charging parties or within a distance of 300′ of any dwelling, house or structure where any people dwell or reside, or using any devices or equipment under any circumstances prior to 6:30 A.M. or using more than one loudspeaker, broadcasting or sound-amplification device at any one time on any road or property immediately adjacent to any road abutting the charging parties' property;

k. Intimidating in any manner or threatening with bodily harm or injury or harassing, assaulting, pushing, striking or in any manner physically contacting any person, clothing or vehicle of any of the charging parties' employees, agents, customers, visitors, invitees, suppliers or other persons entitled to enter on their premises;

l. Shouting, yelling, uttering or using any loudspeakers or broadcasting device to utter words of profanity or opprobrium or making derogatory, obscene or abusive remarks or gestures so as to harass, intimidate or threaten or lead to a disturbance or result in any breach of peace.

FOR PURPOSE OF THIS ORDER, property or premises of the charging parties means property owned or leased by charging parties or upon which agricultural crops

are being harvested, cultivated, packed or tied by or for the charging parties, to wit: Ever-Krisp Vegetables, Inc., Tanita Farms, Inc., B & T Farms, Phoenix Vegetable Distributors, Jack Okabayashi Farms, George Matsumori, Davis Packing Co., Triple T. Farms, Inc. and Bodine Produce Co.

IT IS FURTHER ORDERED that a copy of the Petition and this Temporary Restraining Order and Order to Show Cause be served on the Respondent herein on or prior to the 30th day of December, 1977.

IT IS FURTHER ORDERED that the Maricopa County Sheriff's Office and any other state or local enforcement agency, shall be and are hereby directed to enforce the terms and provisions of this Order.

DONE IN OPEN COURT this 20th day of December, 1977.

HAROLD G. MARTIN
Judge of the Superior Court

STATE OF ARIZONA,
County of Maricopa, } ss.

I, WILSON D. PALMER, Clerk of the Superior Court of Maricopa County, State of Arizona, hereby certify that I have compared the foregoing copies with the originals
TEMPORARY RESTRAINING ORDER PURSUANT to A.R.S. S23-1390K AND ORDER TO SHOW CAUSE
Filed Dec. 20, 1977
PETITION FOR TEMPORARY RESTRAINING ORDER PURSUANT TO A.R.S. 23-1390 (K)

Filed Dec. 16, 1977

in the above entitled C361105 and that same are true copies of the originals, and of the whole thereof.

WITNESS my hand and the Seal of said Court, this 21st day of December, 1978.

WILSON D. PALMER, Clerk
By M. Perry,
Deputy Clerk.

Form 43-15A

Since this document is not a part of the trial record, a certified copy has been attached to the brief stamped "original".

Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANTS' REPLY BRIEF

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IN THE

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UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANTS' REPLY BRIEF

I.

THE APPELLEES' REQUESTED CHECKLIST APPROACH VIOLATES BOTH CONSTITUTIONAL LIMITATIONS AND PRUDENTIAL CONSIDERATIONS

The appellants' opening brief discusses the reasons why a checklist review of an entire, comprehensive regulatory statute violates Article III's case or controversy requirement.

The appellees' brief effectively demonstrates the impracticability of such an approach. It contains ten questions presented. Five of the ten are issues that were neither considered by the district court, nor presented by the Jurisdictional Statement or the Motion to Affirm. Thus, the appellees request not only that the district court's checklist approach be continued in this Court, but also that the list be expanded.

Even the ten questions presented are not exhaustive. The 146 pages of the appellees' brief suggest literally dozens of legal questions as subissues of the questions presented. Many of them are important questions, including questions of interpretation of Arizona statutes, questions of fact, questions of policy, and questions of federal constitutional law. If nothing else, their sheer magnitude illustrates the practical wisdom of the case or controversy requirement that legal issues—especially constitutional issues—be decided as they are presented by actual application of the challenged provisions. Issues concerning labor election procedures ought to be decided in labor election cases, sharpened by the facts of those cases. Any challenge to the prohibition against the false secondary consumer publicity provision should arise out of a case involving consumer publicity. If the Seventh Amendment is to be held binding on the states because AERA arbitration is not a constitutionally adequate substitute for jury trial litigation, the decision should be made in a case involving application of the statute's arbitration provisions. And if for the first time in history constitutional rigidity is to be imparted into the *Babcock and Wilcox*

standards, it should be in an actual case where there is evidence concerning the *Babcock and Wilcox* factual criteria.

The appellants' opening brief contains the following statement:

> We know of no case—and in the six years of this litigation the appellees have discovered none—in which this Court has approved the wholesale consideration of the constitutionality of a comprehensive regulatory statute, each of whose challenged provisions raises separate constitutional issues, in advance of, and in the absence of, the application of those provisions. The approach to that kind of statute has always been to consider the individual provisions as each is involved in concrete factual settings raising the constitutional issues of which the plaintiffs complain.[1]

The appellees' brief does not discuss any case that even purports to fit the foregoing description, which is also a description of the instant case. The appellees complain that "[a]bstention would force the Union to bring a declaratory judgment action in state court or to engage in constitutionally protected action and wait for the AERB or private parties to seek enforcement against it, one or several sections of the Act at a time."[2] This is a reasonably accurate description of how the various provisions of important, comprehensive, regulatory statutes have come before this Court for consideration of constitutional issues. And no one disputes that this regulatory statute is important, and comprehensive. Of course it takes longer. Of course the

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[1] Appellants' Brief, 22-23.

[2] Appellees' Brief, 58.

opponents would prefer a massive, checklist review. Beyond any doubt, the opponents of the Wagner Act, or Taft-Hartley, or Landrum-Griffin, or the Smith Act, or the Subversive Activities Control Act, or the Social Security Act would have preferred to lay the entire package before this Court and obtain a ruling on the validity of every single objectionable provision. Instead, the federal courts have dealt with those statutes "one or several sections ... at a time" as the provisions of that section or sections were applied to particular plaintiffs. They have done so with the benefit of a record that showed in that case how that provision affected the interests of the particular individual. During the interim, actual experience with the sections at issue—including administrative and judicial enforcement and interpretation—has served to enlighten the judicial decision once the issues reached the courts.

Twice in its history, this Court has considered constitutional challenges to an entire comprehensive state labor statute apart from any enforcement of its individual provisions. *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945) and *A.F.L. v. Watson,* 327 U.S. 582 (1946). In neither of those cases did the breadth of issues approach those which the appellees have asked the Court to decide.

In both *McAdory* and *Watson,* this Court declined to decide in the abstract. In *McAdory* the Court held that the case was not ripe, and in *Watson,* the Court abstained. The principal distinction between the AERA and the statutes in *McAdory* and *Watson* is that the provisions contained in the AERA cover a far broader range of legislative policy decisions. The case

or controversy issue in this case therefore falls squarely within the judgment dismissing the writ of certiorari in *McAdory:* "[w]e would not have granted certiorari to review so unsubstantial a question ..." 325 U.S. at 472.

In their Motion to Affirm, the appellees advanced one set of criteria for distinguishing *McAdory* and *Watson.*[3] Those criteria were dealt with in the appellants' opening brief,[4] and were not repeated in the appellees' merits brief. In a footnote, the appellees now suggest other distinctions.[5] *McAdory* and *Watson* have not been distinguished, and they cannot be. For reasons developed in our opening brief, the defect in those cases is identical to the defect here: both involved attempts at checklist review of comprehensive labor statutes apart from actual application of the provisions challenged. To our knowledge, these are the only two cases involving attacks on state labor statutes apart from enforcement of their individual provisions. The principle, however, extends beyond the state labor statute context. We know of no Supreme Court precedent for the district court's wholesale consideration of the constitutionality of a comprehensive regulatory statute in advance of, and in the absence of, the application of the individual statutory provisions. See *Blanchette v. Connecticut General Insurance Corp.,* 419 U.S. 102 (1974); *California Bankers Association v.*

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[3] Motion to Affirm, 37-38.

[4] Appellants' Brief, 25-27.

[5] Appellees' Brief, 43-44, footnote 106.

Shultz, 416 U.S. 21 (1974); *Communist Party v. Subversive Activities Control Board,* 367 U.S. 1 (1961); *United Public Workers v. Mitchell,* 330 U.S. 75 (1947).

The appellees' brief is replete with conclusionary generalities to the effect that the statute has been enforced. In addition, three cases outside the record are appended to the brief. All of these assertions notwithstanding, three controlling realities have not been challenged:

1. Not one single provision of the act held unconstitutional by the district court has ever been applied to any plaintiff in this lawsuit.

2. The only provision held unconstitutional by the district court that has been applied to anyone is section 1389, dealing with elections. In no election that has been held, does the record reflect any assertion of unfairness because of delays.

3. This case does not arise out of the application of any statutory provision to any person. The plaintiffs complain of instances in which temporary restraining orders were entered against them. They also complain that state court orders have been entered prohibiting pressures on secondary employers. This case did not arise out of any of those enforcement actions. Those actions occurred in other cases, all of which are now final and not appealable. Even if they were not final and nonappealable, the proper context in which to raise any constitutional questions is the particular case or controversy in which the questions arose.

The appellees also assert that the Act has caused decline in union membership, failure of agricultural wages and benefits in Arizona to keep pace with other states, and a general decline in union support. These conclusionary statements purport to be based on testimony by Mr. Chavez at pages 399 through 400 of the Appendix of Record. We invite the Court's examination of that testimony. It consists of highly speculative generalizations, with no supporting specifics. There are no data, no numbers, not even any examples. Moreover, even if these self-serving generalizations were sufficient to establish concrete harm, the causal connection would still not exist. *Warth v. Seldin,* 422 U.S. 490 (1975). That is, assuming *arguendo,* the existence of such harm, it was not caused by the provisions invalidated by the district court, because none of those provisions has ever been applied to any of the plaintiffs in this law suit.

Much of the appellees' argument depends on the existence of the criminal provision, section 1392. For reasons discussed at page 37 in our opening brief, we disagree that section 1392 can breathe case or controversy status into this case. That issue need not be reached, however. Even the District Court agreed that this section is severable.

The appellees' attempt to fit this case within the overbreadth doctrine cannot succeed. As this Court clarified in *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), the overbreadth doctrine, applicable in First Amendment cases, is an exception to the principle "[e]mbedded in the traditional rules governing constitutional adjudication ... that a person to whom a statute may constitutionally be applied will not be

heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others . . . ." 413 U.S. at 610. The exception is "a limited one at the outset [and] attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct. . . ." *Id.* at 615. Within its limited sphere, the overbreadth doctrine has both an absolute, and a comparative dimension. That is, the range of potential sweep in the constitutionally protected activity must be not only real, "but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615.

Judged by these standards, the overbreadth challenge in *Broadrick* to Oklahoma's little Hatch Act was rejected. The overbreadth challenge in this case rests on even more tenuous grounds for the following reasons:

1. The Court's opinion in *Broadrick* carefully spells out the relationship between overbreadth doctrine and principles dealing with third party standing. 413 U.S. at 610-611. Standing is one component of the case or controversy requirement. In *Broadrick*, the Court had before it a comparatively precise challenge: the appellants asserted that in addition to concededly prohibitable activity, the statute prohibited the wearing of lapel buttons or the display of bumper stickers. In the instant case, the appellees are asking that the overbreadth doctrine be applied not just to one section, but to an entire statute. The various sections of the AERA are related in the sense that all comprise part of a comprehensive labor law, but the component sections contain separate policy judgments, so that the Court is being asked to review in the abstract not just

one legislative policy judgment, but many. Relative to the linkage between overbreadth and standing, the Court in *Broadrick* observed that," "[t]hese principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." 413 U.S. at 610-611. The difference between *Broadrick* and the instant case in this respect is that both quantitatively and qualitatively the appellees here seek to extend the territory of the roving commission far beyond what the appellants were asking in *Broadrick*.

2. It is very clear from *Broadrick* that the applicability of the overbreadth doctrine depends on the mix of speech and conduct in the particular case.[6] The activities covered by the AERA will necessarily involve a mix of speech and conduct. What this case-to-case, section-to-section mix will be cannot be determined in advance nor in the abstract.

3. This Court stated in *Broadrick:* "Application of the overbreadth doctrine ... is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been *or could be* placed on the challenged statute." 413 U.S. at 613 (emphasis added)

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[6] 413 U.S. at 615. This of course is consistent with the Court's decisions generally in the First Amendment area. See, e.g. *Yates v. United States*, 354 U.S. 298 (1957); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Street v. New York*, 394 U.S. 576 (1969).

II.

THE DISTRICT COURT SHOULD HAVE ABSTAINED

The abstention issue in this case is this simple: there are numerous instances, spelled out in our opening brief, in which the constitutional issue would be raised if the statute were interpreted one way, and avoided if interpreted the other way. This is the pristine circumstance calling for federal judicial abstention.

Particularly astounding in this respect is the appellees' assertion concerning the district court's holding that Arizona's Administrative Procedure Act time limits are applicable to AERA elections: "The district court based this *factual finding* [that the APA time limits are applicable] solidly on expert testimony, testimony that would merely be repeated in a state court were this Court to abstain."[7] The meaning of an Arizona statute does not involve an issue of fact to be resolved by findings. It is an issue of law. The Arizona courts do not resolve issues of law by taking and relying on expert testimony.

It is abundantly clear that there is a serious disagreement among the brief writers in this case concerning the interpretations of the statute. It should be equally clear that the disagreement is genuine, and

[7] Appellees' Brief, 55, (emphasis added).

in most instances, material.[8] In the appellants' view, these differences are not only reasonable; the interpretations that avoid the constitutional issues are the more persuasive.

More than a dozen pages of briefs before this Court have been devoted exclusively to the meaning of Arizona law. If these were not serious issues, they would not have been so treated by our opponents. The United States Supreme Court is not the proper place to resolve these issues of Arizona law.

At one point[9] the appellees suggest that the *Pullman* abstention doctrine should be abandoned altogether. We disagree with that position. It is, however, the only basis on which the appellees could succeed on this issue.

III.

ON THE RECORD IN THIS CASE THE ELECTION PROCEDURES OF THE AERA CANNOT BE HELD UNCONSTITUTIONAL.

We disagree with the appellees' creative hypotheses as to how employees might be excluded from participating in elections. More specifically, we reject the implication that appellees attempt to convey that in

[8] The amici take the position that one such instance, i.e., the authority of the Arizona Board to issue bargaining orders, may not be material, because "the district court's finding [sic] on this point was not a part of its constitutional decision." (Amici Brief, 52). From the district court's opinion, it is not possible to ascertain whether this assertion is correct. In any event, the balance of the district court's interpretations of state law clearly are material.

[9] Appellees' Brief, 60, n. 126.

the Cactus Ranch-Teamsters election the election procedures were utilized by the employer to secure improper objectives. There is absolutely nothing in the record to support that implication.

Hypotheses and speculations aside, the constitutionality of the AERA's election procedures, correctly described by the district court and the appellees as virtually identical to those of the NLRA, stands on unassailed foundations. The case has not been made that an election procedure virtually identical to the NLRA could ever amount to a violation of freedom of association. This would not only call into question the existing national act. It would also raise serious doubt whether the coverage of that act as presently administered could constitutionally be extended to agricultural labor.

The only constitutional argument that has ever been made against the election procedures embodied in this statute is that in the case of certain crops, it may not be possible to hold the election during the period of peak employment. The short answer to this criticism is that Arizona's election procedures cannot possibly be unconstitutional because whatever the optimum solution, Arizona law is sufficiently flexible to adopt it. In some cases, the optimum solution may be to follow the NLRB model and hold the election during the next employment peak. The appellees do not deny that Arizona law permits this option. In other cases, the optimum solution may be to follow the California model, hold an immediate election, and defer all issues

except representation until after the election. The appellees do not deny that Arizona law permits this option.

For reasons developed in our opening brief, the position that the Constitution requires Arizona to follow either the California model or the national model is theoretically unsound. Equally unsound is the position that the Constitution precludes either model. Even as a matter of abstract theoretical logic, however, it is impossible to assail as unconstitutional an election system that permits either option, according to the needs and circumstances of the particular case.

IV.

ON THIS RECORD, THE PROHIBITION AGAINST UNTRUTHFUL PUBLICITY CANNOT BE HELD UNCONSTITUTIONAL ON ITS FACE

The appellant's opening brief discusses three separate reasons why the district court's holding that Section 1385(B) (8) is unconstitutional on its face cannot be sustained.[10] Those reasons have not been effectively refuted, and need not be repeated. Nevertheless, several brief comments are in order concerning assertions made by the appellees and the amici.

The similarity between the AERA's prohibition against untruthful publicity and its counterpart in § 8(b)(4) (ii)(B) of the NLRA has not been adequately explained, and is controlling. The appellees point out that one is a prohibitory section and the other a

[10] Appellants' Brief, 60-64.

guarantee,[11] but there is no suggestion as to why the difference between permitting the truthful and prohibiting the untruthful is of constitutional significance.

The amici point to "this Court's well-established principle of construing the NLRA to prohibit peaceful, speech-related activity for particular ends only when 'there is the clearest indication in the legislative history that Congress intended to do so.' " [Quoting from *Tree Fruits*, 377 U.S. at 62.][12] The amici have correctly stated "this Court's well-established principle." Appellants agree that their statement of principle describes exactly what happened in the *Tree Fruits* case. Fundamental considerations of judicial comity, respect between governments in a federal system, and the rule of necessity all require that a no lesser privilege be afforded the courts of the State of Arizona concerning the reach of that State's statute, and particularly concerning whether Section 1385 (B) (8) would permit a *Times Libel* defense.

The appellees engage in speculation concerning the reach of the statute, and conclude that it "restricts expressions of opinion like 'Unfair to Labor'."[13] That kind of speculation is necessary to the appellees' case, but it is not an adequate basis for constitutional adjudication. We staunchly disagree with the appellees' speculations concerning the meaning of subsection 8, but the right to construe Arizona law is not vested in the appellants or the appellees.

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[11] Appellees' Brief, 77, footnote 157.

[12] Amici Brief, 72, footnote 37.

[13] Appellants' Brief, p. 75.

Finally, it is incorrect to suggest that the appellants have abandoned the position that the district court erred in extending the holding in *AFL v. Swing*, 312 U.S. 321 (1941) to embrace not only primary picketing, but also secondary boycotts. The appellants' attack on that ruling is "fairly comprised"[14] within the appellants' statement of questions presented. The fourth question presented in the Jurisdictional Statement is:

> Whether a state labor statute's extension of the proviso in § 8(b)(4)(ii)(B) of the NLRA, permitting truthful secondary consumer pressures, to a prohibition against untruthful, dishonest and deceptive secondary consumer pressures renders it unconstitutional.

This fourth question is clearly a defense of the constitutionality of section 1385 (B) (8). Examination of that section reveals that it consists of three sentences. The first states the prohibition against consumer pressures by the use of dishonest, untruthful and deceptive publicity. Both the second and third sentences define what is permissible inducement within the meaning of the first sentence. The district court's extension of *Swing* to include secondary as well as primary pressures is fairly comprised, therefore, within the appellants' defense of the prohibition against dishonest, untruthful and deceptive publicity. On the merits of this issue, *Swing* is different from this case in two respects. First, *Swing* involved a prior restraint. Second, *Swing* invalidated a state law that in effect prohibited all primary picketing in the absence of a primary dispute. Section 1385 (B) (8), by contrast,

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[14] Rule 15 (c), Rules of the Supreme Court of the United States.

deals with secondary boycott attempts to subject employers with whom the union has no quarrel to the adverse effects of the boycott. This is, therefore, simply another example of an attempt—common to many labor laws, federal and state—to control secondary boycotts.

V.

THE APPELLEES APPEAR TO HAVE CONCEDED ERROR CONCERNING THE DISTRICT COURT'S SEVENTH AMENDMENT AND SUBSTANTIVE DUE PROCESS HOLDINGS: THEIR ALTERNATIVE GROUND FOR ASSERTING UNCONSTITUTIONALITY OF SECTION 23-1393 (B) CANNOT AND SHOULD NOT BE CONSIDERED BY THIS COURT ON THIS RECORD.

The Motion to Affirm devoted an entire numbered section to the defense of the district court's holding invalidating "compulsory arbitration without court review." (Motion to Affirm, 26) The discussion of the substantive due process and Seventh Amendment issues in the appellees' merits brief consists of two footnote sentences:

> The three-judge court below on its own motion found the binding arbitration provision of §1393(B) violative of substantive due process and the Seventh Amendment. The statute's facial invalidity on First Amendment grounds obviates these other concerns. Appellees' Brief, 71, n. 153.

The "First Amendment grounds" involve a challenge to the temporary restraining order provisions of Arizona's Rule 65. The appellees have appended Arizona's Rule 65 to their brief, in recognition of the fact that

temporary restraining orders under the AERA are governed by that rule. Rule 65 of the Federal Rules of Civil Procedure is appended to this brief. We invite the Court to compare the temporary restraining order provisions of Arizona's rule (65(e)) with their counterpart (really their parent) in the federal rules, Rule 65(b). There is no difference of any consequence.

Even if this Court may at some time want to consider whether the temporary restraining order provisions of Rule 65 raise constitutional issues, it should certainly not be done in a case that does not arise out of the application of Rule 65 to the parties before the Court. With the benefit of neither a lower court opinion nor a supporting record, this is not the appropriate case in which to take on the issue of the constitutionality of Rule 65 of the Federal Rules of Civil Procedure.

VI.

ON THIS RECORD, THE DISTRICT COURT'S HOLDING CONCERNING ACCESS TO FACILITIES CANNOT BE SUSTAINED

The appellees rely on a number of cases involving communications in the labor context. Reliance on those cases is necessarily misplaced, because each of them arose out of specific facts, involving specific attempts to communicate. Here, there are no specific facts. This case does not deal with any particular employer, any particular employees, any particular labor camp, or any particular attempt to communicate. The

district court's judgment represents a blanket invalidation applicable to all employers (whether or not they maintain labor camps), all employees, all labor camps.

The appellees have not taken issue with the appellants' argument that the district court's holding regarding access to facilities is based on three erroneous assumptions. As to the substance of those assumptions, the appellees discuss only the first, whether facilities mean premises. There is absolutely no argument that the *Babcock and Wilcox* standards are constitutionally required. The necessary conclusion that the appellees recognize, as they must, is that "the rights and liabilities of the parties [in a union access case] are dependent exclusively on the National Labor Relations Act." *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976).

Concerning the third assumption, the Motion to Affirm conceded that "[s]ince the existence of adequate alternative means of communication will vary from case to case, that determination must be left for the appropriate Board or court to determine in each instance." Motion to Affirm, 25. Following that concession, however, and the appellants' discussion of it in the merits brief (appellants' brief, 72) no further mention is made of this issue. It cannot be ignored. Even assuming that facilities means premises, and even assuming that the *Babcock and Wilcox* standards were of constitutional dimension, those standards turn on factual inquiries that will necessarily vary from case to case: whether there are other available channels of

communication and whether there has been discrimination against the union by allowing other distribution.[15]

VII.

THE APPELLEES' ERROR ON THE SEVERABILITY ISSUE PRECLUDES THEIR ATTEMPT TO EXPAND THE ISSUES IN THIS CASE.

The appellees seek not only to have this Court approve the district court's constitutional adjudication in the abstract; they also seek rulings on issues that the district court did not reach. The appellees' reliance on the principle that the prevailing party may rely on any ground that supports its judgment is misplaced. The appellees are not raising additional grounds in support of their judgment, but are seeking to enlarge the judgment itself. The new issues can be considered as additional grounds in support of the judgment only if the Court accepts their view concerning severability.

The linkage between the appellees' enlarged checklist and the severability issues is as follows. The judgment in this case is that the entire Agricultural Employment Relations Act is invalid, every section, every paragraph, every line. The supporting grounds for that judgment are the invalidity of five specific provisions, and the necessarily implicit conclusion that "it is evident that the legislature would not have enacted [the balance of the statute] independently of

[15] The statement of the amici (Amici Brief, 48) that the vast majority of farm workers reside in labor camps is not correct. The sole reference cited by Amici as a basis for the statement is not to the record but to a statement in the opinion below. The fact is the record contains absolutely no support for the assertion.

[those five provisions]." *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932). If that conclusion is correct, then an argument can be made that the appellees' additional issues constitute additional support for the judgment that the entire statute is invalid. Otherwise, they are simply attempts to enlarge the judgment.

The appellees' position concerning severability is clearly erroneous. From the motion to affirm to the merits brief, the severability argument has been downgraded so that in the appellees' view it no longer constitutes one of the questions presented. There is absolutely no reply to the discussion contained in pages 73 through 77 of the appellants' brief concerning the functional independence of the provisions of the Act. Also lacking is any treatment, or even mention, of *Champlin Refining Co. v. Corporation Commission*, 287 U.S. 210 (1932), notwithstanding the fact that the statement contained in that case and quoted in our opening brief is the most frequently cited and most authoritative general statement of the severability principle. Neither is there any mention or citation of *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) and *United States v. Jackson*, 390 U.S. 570, 585 (1968) which, for reasons developed in our opening brief, reflect the Court's current rules concerning the significance of the presence or absence of a severability clause, and the integration of the severability doctrine into the larger principle that statutes are to be interpreted so as to save rather than destroy.

The appellees' brief discussion of severability relies on two cases, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *Sloan v. Lemon*, 413 U.S. 825 (1973). It is doubtful that *Carter v. Carter Coal Co.* ever stood for the proposition that the absence of a severability clause gives rise to a presumption. That clearly is not the law today, as declared in as plain language as possible by *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) and *United States v. Jackson*, 390 U.S. 570, 585 (1968), discussed in appellants' opening brief. The single sentence quoted from *Sloan v. Lemon*, 413 U.S. 825 (1973) deals with an entirely different situation. Indeed, the *Sloan* opinion cites those portions of *Tilton* and *Champlin* cited in appellants' opening brief. The controlling reality — undisputed and undisputable — is that "the ultimate determination of severability will rarely turn on the presence or absence of [a severability] clause"[16] and the cases from *Champlin* through *Tilton* demonstrate that the Court has integrated severability rules into the larger principle that "the cardinal principle of statutory construction is to save and not to destroy." *Tilton v. Richardson*, 403 U.S. at 684.

We agree with the amici that "the decision on the constitutionality of the compulsory arbitration provision was wholly separate from the court's holdings on the AERA election procedures, the AERA access provision and the unfair labor practice provision prohibiting certain publicity directed at the ultimate consumer of agricultural products."[17] The obvious reason that the decision on the constitutionality of

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[16] *United States v. Jackson*, 390 U.S. 570, 585, n. 27 (1968).

[17] Amici Brief, 56, footnote 32.

each of these provisions is separate, and should be considered separately is that the provisions themselves are functionally separate. They raise separate constitutional issues, and represent separate policy decisions.

For reasons developed in appellants' opening brief, it is clear that the various sections of the AERA fit squarely within the frequently cited *Champlin* principle:

> Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. 286 U.S. at 234.

CONCLUSION

The decisions of this Court can be searched in vain for a precedent supporting the district court's holding. Moreover, even in the cases in which this Court has rejected blanket inquiries into comprehensive statutes, there is no parallel for the breadth of the attack by these plaintiffs. Cases such as *McAdory*, *Watson*, *Mitchell*, and *Communist Party v. Subversive Activities Control Board* called into question identified provisions of the acts at issue. Here the district court held the entire Act unconstitutional—every employer unfair labor practice, every employee unfair labor practice, election procedures, board composition and authority, and rights of employees vis-a-vis their union and their employer—everything from the first sentence to the last. It was a feat comparable to reviewing in their entirety the Taft-Hartley Act or the Social Security Act.

The district court has usurped the function of the Arizona Legislature, by substituting its views concerning what constitutes good policy for those of the Legislature. It has also usurped the function of the Arizona courts by reaching not only the statute's constitutionality but also its meaning. In every single instance where there was a choice, the district court opted for the interpretation that raised, rather than avoided, the constitutional issues.

In obvious recognition of the inadequacy of the lower court's rulings, the appellees at the merits brief stage attempt to add five more questions presented. Substantively, the appellees' positions on those issues lack merit, but the merits of those issues are not before the Court. The jurisdiction of federal courts is limited to cases or controversies. The Council of Revision as part of our governmental scheme was rejected 190 years ago.

The Court should reverse the judgment of the district court.

Respectfully submitted,

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APPENDIX A

Rule 65.

INJUNCTIONS

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice

shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No

such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond of undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(c) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, *et al.*,

Defendants and Appellants,

and

ARIZONA FARM BUREAU FEDERATION, an ARIZONA CORPORATION, *et al.*,

Intervenor Appellants,

vs.

UNITED FARM WORKERS NATIONAL UNION on Behalf of Itself and Its Members, *et al.*,

Appellees.

On Appeal From the United States District Court for the District of Arizona.

Brief of Amici Curiae, Agricultural Producers Labor Committee and South Central Farmers Committee.

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On Appeal From the United States District Court for the District of Arizona.

Brief of Amici Curiae, Agricultural Producers Labor Committee and South Central Farmers Committee.

This brief is filed with the written consent of all parties pursuant to Rule 42 of this Court.

Statement of Interest of Amici.

The Agricultural Producers Labor Committee (APLC) is a trade association representing farmers who grow ninety percent of California's citrus and avocado crop. The South Central Farmers Committee (SCFC) is composed of producers of table grapes in California's San Joaquin and Coachella Valleys.

Members of both organizations employ agricultural laborers to cultivate and harvest their crops, and are therefore subject to the California Agricultural Labor Relations Act (ALRA), California Labor Code §§ 1140, *et seq.** The United Farm Workers of America, AFL-CIO (UFW), an affiliate of appellee union, has been certified by the California Agricultural Labor Relations Board (ALRB) as the exclusive bargaining representative of the agricultural employees of many of the farmers who belong to APLC and SCFC. Some of these farmers have entered into collective bargaining agreements with the UFW. Others are involved in litigation before the ALRB and in the California courts over the interpretation and application of the ALRA. The UFW is a real party in interest to much of this litigation.

Both APLC and SCFC have taken an active interest in rulemaking by the ALRB and in legislation concerning agricultural labor matters.

Amici are substantially interested in this case because of its potential impact on the ALRA. While the California act is new and is not perfect, amici think that it should be given a chance to operate and develop free of the sort of unalterable constitutional standards suggested by the district court. The application, interpretation and, if necessary, modification of the ALRA should be left to the ALRB, the California courts and the California Legislature. Because affirmance of the decision below would cast serious doubt on the constitutionality of many of the ALRA's provisions and severely limit the choices available to the ALRB, courts and legislature, amici join appellants in requesting reversal.

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*The text of the ALRA is attached as an appendix.

ARGUMENT.

INTRODUCTION.

At the invitation of appellee union, the district court used the California act as a yardstick for measuring the counterpart Arizona statute. Jurisdictional Statement at A-17, A-19. It comes as no surprise that the union finds California's law preferable to Arizona's, *see* Motion to Affirm at 8, because the union has played a highly significant role in the formulation and administration of the California act. Yet it is very doubtful whether even the "model" ALRA could meet the standards laid down by the three-judge court for a constitutional farm labor law. Thus, while the district court's holding was evoked by a state law which it perceived as anti-union, affirmance of that holding could be expected directly to affect *all* agricultural labor statutes, present and future, state and federal. Amici submit that it is not the function of this Court to promulgate uniform national standards for farm labor legislation, a task Congress has thus far explicitly eschewed.

1. The California Act Precludes Voluntary Recognition of a Union.

According to the union, the feature of the Arizona law which triggers close scrutiny of its election procedures is its asserted prohibition on voluntary recognition of a union. Motion to Affirm at 11-12. The union seeks to distinguish the NLRA on the ground that it permits recognition based on authorization cards or other evidence of majority support. *Id.* at 15 n. 11.

Amici can find no provision in the Arizona act having the effect claimed by the union, nor anything in the district court's opinion embracing the union's theory.

Sections 23-1385(A)(5) and 23-1389(A) of the AERA merely establish that an employer can be *required* to bargain only with a union which has won an election. Neither section forbids voluntary recognition. Because the *opportunity* for recognition is all employees have in the absence of any regulatory statute, it is hard to see how Arizona's election procedures can possibly infringe any right of constitutional dimension.

Nevertheless, if the AERA is suspect because it precludes voluntary recognition, the California act wears the same Achilles' Heel. Section 1153(f) of the ALRA makes it an unfair labor practice to recognize or bargain with a union that has not been certified based on a secret ballot election. The California board has recognized that the ALRA differs from the NLRA in this respect. *See Eugene Acosta,* 1 A.L.R.B. No. 1 at 17-18 (1975). Thus, if searching scrutiny of the Arizona law's election procedures is due, rigorous review of the analogous provisions of the California law must equally be warranted.

2. The California Act Disenfranchises Substantial Numbers of Employees.

The district court found that because of the migratory and transitory nature of agricultural employment, the Arizona law's election procedures would disenfranchise a significant and substantial number of employees. Jurisdictional Statement at A-28. This perceived shortcoming was deemed offensive to the first and fourteenth amendments. *See* Motion to Affirm at 10-11. Amici believe there is substantial doubt whether the California statute's election procedures could pass the "no substantial disenfranchisement" test adopted by the three-judge panel. Most of the specific defects the court detected in the Arizona act also exist under the California law.

A. The California Act Permits Elections to Be Held After a Period of Peak Employment Has Ended and Most Employees Have Departed.

The district court held Arizona's election procedures unconstitutional because they fail to require in every case that both the filing of the election petition and the holding of the election itself take place during a period of peak employment. Jurisdictional Statement at A-16, A-25 to A-26. The court adopted the California statute's definition of a peak period as one in which fifty percent or more of the highest number of workers employed at any time during the year are present. *Compare id.* at A-15 *with* ALRA § 1156.4.

The California act differs from the Arizona law in providing that this peak employment condition must be met during the payroll period preceding the filing of an election petition. ALRA § 1156.3(a)(1). The ALRA also specifies that the workers employed in that payroll period are the eligible voters. ALRA § 1157. But, like the Arizona statute, the California law does not require that the election itself be held during a peak period. The only limitation imposed on the timing of the election is that it be held within seven days of the filing of the petition. ALRA § 1156.3(a).

As a result, if a layoff takes place within seven days of the filing of the petition, many of the eligible voters may have departed by election day. *See Lu-ette Farms,* 2 A.L.R.B. No. 49 at 5 (1976), election upheld although only 53 of 112 eligible voters employed on day of election). Indeed, a petition may be

filed although many of those who will be eligible to vote have already left. *Cf. id.* at 6 (election upheld although at least 40 of 112 eligible voters not employed on day petition was filed). Moreover, the group of employees theoretically eligible to vote may be only half the size of the work force employed at some time earlier in the year. ALRA § 1156.4.

Thus, if the Arizona law is infirm on the ground that it permits an election to be held after a period of peak employment has ended and a substantial number of employees may be absent and unable to vote, the California statute is similarly defective.

B. The California Act Disenfranchises Regular Employees Who Do Not Work Immediately Prior to the Filing of an Election Petition.

The district court also held Arizona's election procedures unconstitutional because, as it interpreted the AERA, a farmer's regular permanent and temporary employees (those who worked for him in prior years) cannot vote if they are not employed at the time of the election. Jurisdictional Statement at A-27 to A-28. The California law's election provisions are virtually identical. Only employees who were paid, entitled to be paid, on vacation or on sick leave during the payroll period immediately preceding the filing of an election petition are eligible to vote. Employees laid off prior to the eligibility period for lack of work cannot vote regardless of the duration of their employment in the year of the election or in prior years. ALRA § 1157; *Rod McClellan Co.*, 3 A.L.R.B. No. 6 at 3-4 (1977); *Yoder Bros.*, 3 A.L.R.B. No. 4 at 13 (1976).

C. The California Act Permits an Election Among One Group of Employees to Bar an Election Later in the Year Among Another Group of Employees.

The three-judge court further ruled that the Arizona law abridged associational rights because an election among one group of employees could bar another election for one year and thereby disenfranchise other groups of employees who were not present and eligible to vote in the initial election. Jurisdictional Statement at A-28 to A-29. This situation could arise where there are two separate harvest periods, as is true with lettuce, *id.* at A-15, or where the harvest is year-round but employee turnover is high, as is true with citrus, *id.* at A-16.

The same difficulty exists under the California act, which also contains a one year election bar, ALRA § 1156.5. In the multiple peak and high turnover cases, a substantial number of employees—perhaps a majority of the total number employed during the year—will be excluded from participation in the single election which the law allows, regardless of when it is held. The ALRB has expressly recognized this unavoidable dilemma. *Eugene Acosta*, 1 A.L.R.B. No. 1 at 19 n. 15 (1975). If the Arizona statute must fall because of its failure to solve this conundrum, so must the California law.

The Arizona and California acts share many weaknesses. In other respects, they diverge. The Arizona Legislature has chosen one approach, the California Legislature, another. But the differences between the two laws are not of constitutional dimension. There is no single constitutionally-mandated solution—nor, in some cases, any solution—to the vexing difficulties

posed by the seasonal and migratory nature of agricultural employment.

3. The California Act Does Not Provide for Bargaining Orders.

The district court held that a state labor relations statute must provide for the issuance of bargaining orders in cases of egregious pre-election employer misconduct, thereby elevating this Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), to constitutional status. Jurisdictional Statement at A-29 to A-30. In support of its holding, the lower court intimated that the ALRB has found bargaining orders necessary in California. *Id.* at A-19.

Although several cases are pending in which the UFW has requested bargaining orders, to the knowledge of counsel no decision of the ALRB or its administrative law officers has held that the California statute permits imposition of a bargaining obligation based on anything less than a union's victory in a secret ballot election. In our view, it is unlikely that any such ALRB decision will issue or be upheld by the California courts. Section 1153(f) of the ALRA expressly declares it unlawful for an employer to recognize or bargain with a union which has not won a valid election, and it is difficult to see how this provision allows for the imposition of *Gissel*-type bargaining orders.

Affirmance, however, would take the matter out of the hands of the ALRB and the state courts, and require that the California act be construed to permit bargaining orders as sought by the UFW or be declared unconstitutional. Amici submit that the California board, courts and legislature are fully capable of working

out their own solutions to the problem of pre-election employer misconduct. Indeed, experience under the California statute indicates that they have already done so. Notwithstanding the contrary implication in the district court's opinion, unions have been able successfully to organize farmworkers in California despite the absence of bargaining orders.

If, as we believe, the California law does rule out bargaining orders, surely this omission does not make a nullity of California's effort to guarantee farmworkers the right freely to express their choice concerning unionization through a secret ballot election.

4. The California Act Does Not Provide for Enforcement of First Amendment Access Rights.

Section 23-1385(C) of the Arizona act states that an employer shall not be required to make available "facilities" to a labor union. Assuming that "facilities" included real property, the district court held that this provision violated the first and fourteenth amendments as construed by the Court in *Marsh v. Alabama*, 326 U.S. 501 (1946). Jurisdictional Statement at A-36 to A-40. The lower court predicated its invocation of the first amendment on a finding that some employers operate labor housing which it analogized to the company town in *Marsh*.

Despite the district court's assertion that section 23-1385(c) provides a "positive tool" to keep out union organizers, the manifest purpose of the invalidated provision is simply to foreclose the Arizona board from holding a denial of facilities to be an unfair labor practice under AERA §§ 21-1383(A) and 23-1385 (A)(1). It does not close the doors of the Arizona

courts to actions for declaratory or injunctive relief, nor does it forbid the assertion of a first amendment defense to an action for trespass. Thus, the only explanation for the lower court's holding is that Arizona is constitutionally *required* to provide for enforcement of first amendment access rights through its state labor board, notwithstanding this Court's ruling in *Hudgens v. NLRB*, 424 U.S. 507 (1976), that the NLRB must *not* apply constitutional criteria in considering access questions.

Like the NLRB, the California board is not authorized to consider first amendment principles in construing and applying the ALRA. Instead, the ALRB enforces a purely statutory right of access to farmers' fields. 8 Cal. Admin. Code § 20900; *see ALRB v. Superior Court of Tulare County*, 16 Cal.3d 392, 546 P.2d 687, 128 Cal.Rptr. 183, *appeal dismissed*, 429 U.S. 802 (1976). In so doing, the California board has attempted to balance employees' statutory organizational rights against employers' constitutional property rights and accordingly limit unions' access to the fields, as required by the Court's decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). While the ALRB nonetheless purports to ban *all* restrictions on admittance to private farm labor housing, the California courts may yet strike a different balance and deny or limit such access in accordance with the *Babcock & Wilcox* standard.

Affirmance of the lower court's holding that a state labor board must enforce first amendment rights, together with its finding that the company town model is germane to agriculture, would mandate an entirely different approach to access issues in California. Under *Marsh v. Alabama*, a finding that private property

is like a company town — that it is the functional equivalent of public property — dictates that it be treated exactly like public property for purposes of applying the first amendment. The adequacy of alternatives for reaching those who work or reside on the property is thereafter irrelevant. Accordingly, affirmance would compel California to authorize ALRB enforcement of a completely unrestricted right of access to agricultural property, without regard to the views of California's courts or legislature.

Conclusion.

The Court does not need to be reminded that the effects of affirmance would extend throughout the country. What amici have sought to do is demonstrate that those effects would be intensely felt even in California, a state in the forefront of ongoing experimentation with agricultural labor relations legislation. Affirmance would dampen or destroy California's experiment in creative federalism, and discourage other states from seeking to discover more perfect solutions to the difficulties which the Arizona and California legislatures have addressed.

Accordingly, amici join in appellants' request that the judgment of the district court be reversed.

Respectfully submitted,

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November 24, 1978

APPENDIX A.

CALIFORNIA LEGISLATURE—1975-76 THIRD EXTRAORDINARY SESSION

SENATE BILL No. 1

Introduced by Senator Dunlap
(Coauthor: Assemblyman Berman)

May 20, 1975

REFERRED TO COMMITTEE ON INDUSTRIAL RELATIONS

An act to add Part 3.5 (commencing with Section 1140) to Division 2 of the Labor Code, relating to agricultural labor.

LEGISLATIVE COUNSEL'S DIGEST

SB 1, as introduced, Dunlap (I.R.). Labor: agricultural labor relations.

Existing state law does not contain any provisions specifically relating to agricultural labor relations. However, existing law does provide that individual workers in the state shall have full freedom of association, self-organization, and designation of representatives of their own choosing to negotiate the terms and conditions of their employment, and shall be free from interference, restraint, or coercion of employers in the designation of representatives, in self-organization, and other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

This bill would enact the Agricultural Labor Relations Act of 1975 to set forth the policy of this state with regard to agricultural products and pursuits, and to define the rights, powers, and duties of agricultural employers and their employees, and of labor organizations representing, or desiring to represent, such employees.

This bill would define certain conduct as unfair labor practices of employers and labor organizations.

This bill would provide for the holding of a secret ballot election in a bargaining unit composed of agricultural employees of an employer for the selection of a labor organization as their exclusive bargaining representative, and would provide the procedure for petitions for, the conduct of, and the eligibility of agricultural workers to vote in, such elections.

This bill would make provision for the institution of suits against labor organizations, and would make it unlawful for agricultural employers, associations thereof, and other specified persons to make specified payments, loans, or deliveries, or agree to do such, to labor organizations, representatives of agricultural employees, and other designated persons. It would also make it unlawful for agricultural employee representatives, labor organizations and others to receive such payments, loans, or deliveries. It would also specify certain exemptions from and exceptions to such prohibitions.

This bill would also create an Agricultural Labor Relations Board in state government, and specify its membership, powers, and duties under the bill.

This bill would specify the extent of judicial review of actions brought before the board pursuant to the bill, and would provide a penalty for violation of the bill's provisions or interference with proper actions of the board.

Finally, the bill would provide that neither appropriation is made nor obligation created for the reimbursement of any local agency for any costs incurred by it pursuant to the bill.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no state funding.

The people of the State of California do enact as follows:

SECTION 1. In enacting this legislation the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations.

This enactment is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state. The Legislature recognizes that no law in itself resolves social injustice and economic

dislocations.

However, in the belief the people affected desire a resolution to this dispute and will make a sincere effort to work through the procedures established in this legislation, it is the hope of the Legislature that farm laborers, farmers, and all the people of California will be served by the provisions of this act.

SEC. 1.5. It is the intent of the Legislature that collective-bargaining agreements between agricultural employers and labor organizations representing the employees of such employers entered into prior to the effective date of this legislation and continuing beyond such date are not to be automatically canceled, terminated or voided on that effective date; rather, such a collective-bargaining agreement otherwise lawfully entered into and enforceable under the laws of this state shall be void upon the Agricultural Labor Relations Board certification of that election after the filing of an election petition by such employees pursuant to Section 1156.3 of the Labor Code.

SEC. 2. Part 3.5 (commencing with Section 1140) is added to Division 2 of the Labor Code, to read:

PART 3.5. AGRICULTURAL LABOR RELATIONS

CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

1140. This part shall be known and may be referred to as the Agricultural Labor Relations Act of 1975.

1140.2. It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to

provide for collective-bargaining rights for agricultural employees.

1140.4. As used in this part:

(a) The term "agriculture" includes farming in all its branches, and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 1141j(g) of Title 12 of the United States Code), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market and delivery to storage or to market or to carriers for transportation to market.

(b) The term "agricultural employee" or "employee" shall mean one engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 2(3) of the Labor Management Relations Act (Section 152(3), Title 29, United States Code), and Section 3(f) of the Fair Labor Standards Act (Section 203(f), Title 29, United States Code).

Further, nothing in this part shall apply, or be construed to apply, to any employee who performs work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work (as these terms have been construed under Section 8(e) of the Labor Management Relations Act, 29 USC Section 158(e)) or logging or timber-clearing operations in initial preparation of land for farming, or who does land leveling or only land surveying for any of the above.

As used in this subdivision, "land leveling" shall include only major land moving operations changing the contour of the land, but shall not include annual or seasonal tillage

or preparation of land for cultivation.

(c) The term "agricultural employer" shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any person functioning in the capacity of a labor contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part.

(d) The term "person" shall mean one or more individuals, corporations, partnerships, associations, legal representatives, trustees in bankruptcy, receivers, or any other legal entity, employer, or labor organization having an interest in the outcome of a proceeding under this part.

(e) The term "representatives" includes any individual or labor organization.

(f) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists, in whole or in part, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work for agricultural employees.

(g) The term "unfair labor practice" means any unfair labor practice specified in Chapter 4 (commencing with Section 1153) of this part.

(h) The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or

conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(i) The term "board" means Agricultural Labor Relations Board.

(j) The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

CHAPTER 2. AGRICULTURAL LABOR RELATIONS BOARD

Article 1. Agricultural Labor Relations Board: Organization

1141. (a) There is hereby created in state government the Agricultural Labor Relations Board, which shall consist of five members.

(b) The members of the board shall be appointed by the Governor with the advice and consent of the Senate. The term of office of the members shall be five years, and the terms shall be staggered at one-year intervals. Upon the initial appointment, one member shall be appointed for a term ending January 1, 1977, one member shall be appointed for a term ending January 1, 1978, one member shall be appointed for a term ending January 1, 1979, one member shall be appointed for a term ending January 1, 1980, and one member shall be appointed for a term ending January 1, 1981. Any individual appointed to fill a vacancy of any member shall be appointed only for the unexpired term of the member to whose term he is succeeding. The Governor shall designate one member to serve as chairperson of the board. Any member of the board may be removed by the Governor, upon notice and

hearing, for neglect of duty or malfeasance in office, but for no other cause.

1142. (a) The principal office of the board shall be in Sacramento, but it may meet and exercise any or all of its power at any other place in California.

(b) Besides the principal office in Sacramento, as provided in subdivision (a), the board may establish offices in such other cities as it shall deem necessary. The board may delegate to the personnel of these offices such powers as it deems appropriate to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, to determine whether a question of representation exists, to direct an election by a secret ballot pursuant to the provisions of Chapter 5 (commencing with Section 1156), and to certify the results of such election, and to investigate, conduct hearings and make determinations relating to unfair labor practices. The board may review any action taken pursuant to the authority delegated under this section upon a request for a review of such action filed with the board by an interested party. Any such review made by the board shall not, unless specifically ordered by the board, operate as a stay of any action taken. The entire record considered by the board in considering or acting upon any such request or review shall be made available to all parties prior to such consideration or action, and the board's findings and action thereon shall be published as a decision of the board.

1143. The board shall, at the close of each fiscal year, make a report in writing to the Legislature and to the Governor stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the board, and an account of all moneys it has disbursed.

1144. The board may from time to time make, amend, and rescind, in the manner prescribed in Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2 of the Government Code, such rules and regulations as may be necessary to carry out the

provisions of this part.

1145. The board may appoint an executive secretary and such attorneys, hearing officers, administrative law judges, and other employees as it may from time to time find necessary for the proper performance of its duties. Attorneys appointed pursuant to this section may, at the discretion of the board, appear for and represent the board in any case in court.

1146. The board is authorized to delegate to any group of three or more board members any or all the powers which it may itself exercise. A vacancy in the board shall not impair the right of the remaining members to exercise all the powers of the board, and three members shall at all times constitute a quorum. A vacancy shall be filled in the same manner as an original appointment.

1147. The salary of a member of the board shall be the same as that of a judge of the superior court.

1148. The board shall follow applicable precedents of the National Labor Relations Act, as amended.

1149. There shall be a general counsel of the board who shall be appointed by the Governor, subject to confirmation by a majority of the Senate, for a term of four years. The general counsel shall have the power to appoint such attorneys, administrative assistants, and other employees as necessary for the proper exercise of his duties. The general counsel of the board shall exercise general supervision over all attorneys employed by the board (other than administrative law judges and legal assistants to board members), and over the officers and employees in the regional offices. He shall have final authority, on behalf of the board, with respect to the investigation of charges and issuance of complaints under Chapter 6 (commencing with Section 1160) of this part, and with respect to the prosecution of such complaints before the board. He shall have such other duties as the board may prescribe or as may be provided by law. In case of a vacancy in the office of the general counsel, the Governor is authorized to designate the officer or employee who shall act as general counsel during such

vacancy, but no person or persons so designated shall so act either (1) for more than 40 days when the Legislature is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

1150. Each member of the board and the general counsel of the board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment.

Article 2. Investigatory Powers

1151. For the purpose of all hearings and investigations, which, in the opinion of the board, are necessary and proper for the exercise of the powers vested in it by Chapters 5 (commencing with Section 1156) and 6 (commencing with Section 1160) of this part:

(a) The board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose or examination, and the right to copy, any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The members of the board or their designees or their duly authorized agents shall have the right of free access to all places of labor. The board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the board to revoke, and the board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose

production is required. Any member of the board, or any agent or agency designated by the board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the state at any designated place of hearing.

(b) In case of contumacy or refusal to obey a subpoena issued to any person, any superior court in any county within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which such person allegedly guilty of contumacy or refusal to obey is found or resides or transacts business, shall, upon application by the board, have jurisdiction to issue to such person an order requiring such person to appear before the board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

1151.2. No person shall be excused from attending and testifying, or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. However, no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

1151.3. Any party shall have the right to appear at any hearing in person, by counsel, or by other representative.

1151.4. (a) Complaints, orders, and other process and papers of the board, its members, agents, or agency, may be served either personally or by registered mail or by telegraph, or by leaving a copy thereof at the principal

office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as provided in this subdivision shall be proof of service of the same. Witnesses summoned before the board, its members, agents, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the state, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the state.

(b) All process of any court to which application may be made under this part may be served in the county where the defendant or other person required to be served resides or may be found.

1151.5. The several departments and agencies of the state upon request by the board, shall furnish the board all records, papers, and information in their possession, not otherwise privileged, relating to any matter before the board.

1151.6. Any person who shall willfully resist, prevent, impede, or interfere with any member of the board or any of its agents or agencies in the performance of duties pursuant to this part shall be guilty of a misdemeanor, and shall be punished by a fine of not more than five thousand ($5,000) dollars.

CHAPTER 3. RIGHTS OF AGRICULTURAL EMPLOYEES

1152. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a

labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153.

CHAPTER 4. UNFAIR LABOR PRACTICES AND REGULATION OF SECONDARY BOYCOTTS

1153. It shall be an unfair labor practice for an agricultural employer to do any of the following:

(a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152.

(b) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. However, subject to such rules and regulations as may be made and published by the board pursuant to Section 1144, an agricultural employer shall not be prohibited from permitting agricultural employees to confer with him during working hours without loss of time or pay.

(c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.

Nothing in this part, or in any other statute of this state, shall preclude an agricultural employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this section as an unfair labor practice) to require as a condition of employment, membership therein on or after the fifth day following the beginning of such employment, or the effective date of such agreement, whichever is later, if such labor organization is the representative of the agricultural employees as provided in Section 1156 in the appropriate collective-bargaining unit covered by such agreement. No employee who has been required to pay dues to a labor organization by virtue of his employment as an agricultural worker during any calendar month, shall be required to pay dues to another labor organization by virtue of similar

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employment during such month. For purposes of this chapter, membership shall mean the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing; provided, that such membership shall not be denied or terminated except in compliance with a constitution or bylaws which afford full and fair rights to speech, assembly, and equal voting and membership privileges for all members, and which contain adequate procedures to assure due process to members and applicants for membership.

(d) To discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part.

(e) To refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of Chapter 5 (commencing with Section 1156) of this part.

(f) To recognize, bargain with, or sign a collective-bargaining agreement with any labor organization not certified pursuant to the provisions of this part.

1154. It shall be an unfair labor practice for a labor organization or its agents to do any of the following:

(a) To restrain or coerce:

(1) Agricultural employees in the exercise of the rights guaranteed in Section 1152. This paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

(2) An agricultural employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

(b) To cause or attempt to cause an agricultural employer to discriminate against an employee in violation of subdivision (c) of Section 1153, or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated for reasons other than failure to satisfy the membership requirements specified in subdivision (c) of Section 1153.

(c) To refuse to bargain collectively in good faith with

an agricultural employer, provided it is the representative of his employees subject to the provisions of Chapter 5 (commencing with Section 1156) of this part.

(d) To do either of the following: (i) To engage in, or to induce or encourage any individual employed by any person to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or (ii) to threaten, coerce, or restrain any person; where in either case (i) or (ii) an object thereof is any of the following:

(1) Forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 1154.5.

(2) Forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees. Nothing contained in this paragraph shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

(3) Forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his agricultural employees if another labor organization has been certified as the representative of such employees under the provisions of Chapter 5 (commencing with Section 1156) of this part.

(4) Forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class, unless such employer is failing to conform to an order or certification of the board determining the bargaining representative for employees performing such work.

Nothing contained in this subdivision (d) shall be construed to prohibit publicity, including picketing for the purpose of truthfully advising the public, including consumers, that a product or products or ingredients thereof are produced by an agricultural employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution, and as along as such publicity does not have the effect of requesting the public to cease patronizing such other employer.

However, publicity which includes picketing and has the effect of requesting the public to cease patronizing such other employer, shall be permitted only if the labor organization is currently certified as the representative of the primary employer's employees.

Further, publicity other than picketing, but including peaceful distribution of literature which has the effect of requesting the public to cease patronizing such other employer, shall be permitted only if the labor organization has not lost an election for the primary employer's employees within the preceding 12-month period, and no other labor organization is currently certified as the representative of the primary employer's employees.

Nothing contained in this subdivision (d) shall be construed to prohibit publicity, including picketing, which may not be prohibited under the United States Constitution or the California Constitution.

Nor shall anything in this subdivision (d) be construed to apply or be applicable to any labor organization in its representation of workers who are not agricultural employees. Any such labor organization shall continue to be governed in its intrastate activities for nonagricultural workers by Section 923 and applicable judicial precedents.

(e) To require of employees covered by an agreement authorized under subdivision (c) of Section 1153 the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the board finds excessive or discriminatory under all circumstances. In making such a finding, the board shall consider, among other relevant factors, the practices and customs of labor organizations in the agriculture industry and the wages currently paid to the employees affected.

(f) To cause or attempt to cause an agricultural employer to pay or deliver, or agree to pay or deliver, any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

(g) To picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is either forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees, in any of the following cases:

(1) Where the employer has lawfully recognized in accordance with this part any other labor organization and a question concerning representation may not appropriately be raised under Section 1156.3.

(2) Where within the preceding 12 months a valid election under Chapter 5 (commencing with Section 1156) of this part has been conducted.

Nothing in this subdivision shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver, or transport any goods or not to perform

any services.

Nothing in this subdivision (g) shall be construed to permit any act which would otherwise be an unfair labor practice under this section.

(h) To picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is either forcing or requiring an employer to recognize or bargain with the labor organization as a representative of his employees unless such labor organization is currently certified as the collective-bargaining representative of such employees.

(i) Nothing contained in this section shall be construed to make unlawful a refusal by any person to enter upon the premises of any agricultural employer, other than his own employer, if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this part.

1154.5. It shall be an unfair labor practice for any labor organization which represents the employees of the employer and such employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains, or agrees to cease or refrain, from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be, to such extent, unenforceable and void. Nothing in this section shall apply to an agreement between a labor organization and an employer relating to a supplier of an ingredient or ingredients which are integrated into a product produced or distributed by such employer where the labor organization is certified as the representative of the employees of such supplier, but no collective-bargaining agreement between such supplier and such labor organization is in effect. Further, nothing in this section shall apply to an agreement between a labor organization and an agricultural employer relating to the contracting or subcontracting of work to be done at the site of the

farm and related operations. Nothing in this part shall prohibit the enforcement of any agreement which is within the foregoing exceptions.

Nor shall anything in this section be construed to apply or be applicable to any labor organization in its representation of workers who are not agricultural employees. Any such labor organization shall continue to be governed in its intrastate activities for nonagricultural workers by Section 923 and applicable judicial precedents.

1154.6. It shall be an unfair labor practice for an employer or labor organization, or their agents, willfully to arrange for persons to become employees for the primary purpose of voting in elections.

1155. The expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute evidence of an unfair labor practice under the provisions of this part, if such expression contains no threat of reprisal or force, or promise of benefit.

1155.2. (a) For purposes of this part, to bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

(b) Upon the filing by any person of a petition not earlier than the 90th day nor later than the 60th day preceding the expiration of the 12-month period following initial certification, the board shall determine whether an employer has bargained in good faith with the currently certified labor organization. If the board finds that the employer has not bargained in good faith, it may extend the certification for up to one additional

year, effective immediately upon the expiration of the previous 12-month period following initial certification.

1155.3. (a) Where there is in effect a collective-bargaining contract covering agricultural employees, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification does all of the following:

(1) Serves a written notice upon the other party to the contract of the proposed termination or modification not less than 60 days prior to the expiration date thereof, or, in the event such contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification.

(2) Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications.

(3) Notifies the Conciliation Service of the State of California within 30 days after such notice of the existence of a dispute, provided no agreement has been reached by that time.

(4) Continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract, for a period of 60 days after such notice is given, or until the expiration date of such contract, whichever occurs later.

(b) The duties imposed upon agricultural employers and labor organizations by paragraphs (2), (3), and (4) of subdivision (a) shall become inapplicable upon an intervening certification of the board that the labor organization or individual which is a party to the contract has been superseded as, or has ceased to be the representative of the employees, subject to the provisions of Chapter 5 (commencing with Section 1156) of this part, and the duties so imposed shall not be construed to require either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any

agricultural employee who engages in a strike within the 60-day period specified in this section shall lose his status as an agricultural employee of the agricultural employer engaged in the particular labor dispute, for the purposes of Section 1153 to 1154 inclusive, and Chapters 5 (commencing with Section 1156) and 6 (commencing with Section 1160) of this part, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

1155.4. It shall be unlawful for any agricultural employer or association of agricultural employers, or any person who acts as a labor relations expert, adviser, or consultant to an agricultural employer, or who acts in the interest of an agricultural employer, to pay, lend, or deliver, any money or other thing of value to any of the following:

(a) Any representative of any of his agricultural employees.

(b) Any agricultural labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the agricultural employees of such employer.

(c) Any employee or group or committee of employees of such employer in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing.

(d) Any officer or employee of an agricultural labor organization with intent to influence him in respect to any of his actions, decisions, or duties as a representative of agricultural employees or as such officer or employee of such labor organization.

1155.5. It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by Section 1155.4.

1155.6. Nothing in Section 1155.4 or 1155.5 shall apply to any matter set forth in subsection (c) of Section 186 of

Title 29 of the United States Code.

1155.7. Nothing in this chapter shall be construed to apply or be applicable to any labor organization in its representation of workers who are not agricultural employees. Any such labor organization shall continue to be governed in its intrastate activities for nonagricultural workers by Section 923 and applicable judicial precedents

CHAPTER 5. LABOR REPRESENTATIVES AND ELECTIONS

1156. Representatives designated or selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment. Any individual agricultural employee or a group of agricultural employees shall have the right at any time to present grievances to their agricultural employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect, if the bargaining representative has been given opportunity to be present at such adjustment.

1156.2. The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.

1156.3. (a) A petition which is either signed by, or accompanied by authorization cards signed by, a majority of the currently employed employees in the bargaining unit may be filed in accordance with such rules and regulations as may be prescribed by the board, by an agricultural employee or group of agricultural

employees, or any individual or labor organization acting in their behalf alleging all the following:

(1) That the number of agricultural employees currently employed by the employer named in the petition, as determined from his payroll immediately preceding the filing of the petition, is not less than 50 percent of his peak agricultural employment for the current calendar year.

(2) That no valid election pursuant to this section has been conducted among the agricultural employees of the employer named in the petition within the 12 months immediately preceding the filing thereof.

(3) That no labor organization is currently certified as the exclusive collective-bargaining representative of the agricultural employees of the employer named in the petition.

(4) That the petition is not barred by an existing collective-bargaining agreement.

Upon receipt of such a signed petition, the board shall immediately investigate such petition, and, if it has reasonable cause to believe that a bona fide question of representation exists, it shall direct a representation election by secret ballot to be held, upon due notice to all interested parties and within a maximum of seven days of the filing of the petition. If at the time the election petition is filed a majority of the employees in a bargaining unit are engaged in a strike, the board shall, with all due diligence, attempt to hold a secret ballot election within 48 hours of the filing of such petition. The holding of elections under strike circumstances shall take precedence over the holding of other secret ballot elections.

The board shall make available at any election under this chapter ballots printed in English and Spanish. The board may also make available at such election ballots printed in any other language as may be requested by an agricultural labor organization, or agricultural employee eligible to vote under this part. Every election ballot, except ballots in runoff elections where the choice is between labor organizations, shall provide the employee

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with the opportunity to vote against representation by a labor organization by providing an appropriate space designated "No Labor Organizations".

(b) Any other labor organization shall be qualified to appear on the ballot if it presents authorization cards signed by at least 20 percent of the employees in the bargaining unit at least 24 hours prior to the election.

(c) Within five days after an election, any person may file with the board a signed petition asserting that allegations made in the petition filed pursuant to subdivision (a) were incorrect, that the board improperly determined the geographical scope of the bargaining unit, or objecting to the conduct of the election or conduct affecting the results of the election.

Upon receipt of a petition under this subdivision, the board, upon due notice, shall conduct a hearing to determine whether the election shall be certified. Such hearing may be conducted by an officer or employee of a regional office of the board. He shall make no recommendations with respect thereto. If the board finds, on the record of such hearing, that any of the assertions made in the petition filed pursuant to this subdivision are correct, or that the election was not conducted properly, or misconduct affecting the results of the election occurred, the board may refuse to certify the election. Unless the board determines that there are sufficient grounds to refuse to do so, it shall certify the election.

(d) If no petition is filed pursuant to subdivision (c) within five days of the election the board shall certify the election.

(e) The board shall decertify a labor organization if the U.S. Equal Opportunity Commission has found, pursuant to Section 2000(e)-(5) of Title 29 of the United States Code, that the labor organization engaged in discrimination on the basis of race, color, national origin, religion, sex or any other arbitrary or invidious classification in violation of Subchapter VI of Chapter 21 of Title 42 of the United States Code during the period of such labor organization's present certification.

1156.4. Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope for employees' enjoyment of the rights included in this part, the board shall not consider a representation petition or a petition to decertify as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.

In this connection, the peak agricultural employment for the prior season shall alone not be a basis for such determination, but rather the board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the State of California and upon all other relevant data.

1156.5. The board shall not direct an election in any bargaining unit where a valid election has been held in the immediately preceding 12-month period.

1156.6. The board shall not direct an election in any bargaining unit which is represented by a labor organization that has been certified within the immediately preceding 12-month period or whose certification has been extended pursuant to subdivision (b) of Section 1155.2.

1156.7. (a) No collective-bargaining agreement executed prior to the effective date of this chapter shall bar a petition for an election.

(b) A collective-bargaining agreement executed by an employer and a labor organization certified as the exclusive bargaining representative of his employees pursuant to this chapter shall be a bar to a petition for an election among such employees for the term of the agreement, but in any event such bar shall not exceed three years, provided that both the following conditions are met:

(1) The agreement is in writing and executed by all parties thereto.

(2) It incorporates the substantive terms and conditions of employment of such employees.

(c) Upon the filing with the board by an employee or group of employees of a petition signed by 30 percent or more of the the agricultural employees in a bargaining unit represented by a certified labor organization which is a party to a valid collective-bargaining agreement, requesting that such labor organization be decertified, the board shall conduct an election by secret ballot pursuant to the applicable provisions of this chapter, and shall certify the results to such labor organization and employer.

However, such a petition shall not be deemed timely unless it is filed during the year preceding the expiration of a collective-bargaining agreement which would otherwise bar the holding of an election, and when the number of agricultural employees is not less than 50 percent of the employer's peak agricultural employment for the current calendar year.

(d) Upon the filing with the board of a signed petition by an agricultural employee or group of agricultural employees, or any individual or labor organization acting in their behalf, accompanied by authorization cards signed by a majority of the employees in an appropriate bargaining unit, and alleging all the conditions of paragraphs (1), (2), and (3), the board shall immediately investigate such petition and, if it has reasonable cause to believe that a bona fide question of representation exists, it shall direct an election by secret ballot pursuant to the applicable provisions of this chapter:

(1) That the number of agricultural employees currently employed by the employer named in the petition, as determined from his payroll immediately preceding the filing of the petition, is not less than 50 percent of his peak agricultural employment for the current calendar year.

(2) That no valid election pursuant to this section has been conducted among the agricultural employees of the employer named in the petition within the 12 months immediately preceding the filing thereof.

(3) That a labor organization, certified for an appropriate unit, has a collective-bargaining agreement

with the employer which would otherwise bar the holding of an election and that this agreement will expire within the next 12 months.

1157. All agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election shall be eligible to vote. An economic striker shall be eligible to vote under such regulations as the board shall find are consistent with the purposes and provisions of this part in any election, provided that the striker who has been permanently replaced shall not be eligible to vote in any election conducted more than 12 months after the commencement of the strike.

In the case of elections conducted within 18 months of the effective date of this part which involve labor disputes which commenced prior to such effective date, the board shall have the jurisdiction to adopt fair, equitable, and appropriate eligibility rules, which shall effectuate the policies of this part, with respect to the eligibility of economic strikers who were paid for work performed or for paid vacation during the payroll period immediately preceding the expiration of a collective-bargaining agreement or the commencement of a strike; provided, however, that in no event shall the board afford eligibility to any such striker who has not performed any services for the employer during the 36-month period immediately preceding the effective date of this part.

1157.2. In any election where none of the choices on the ballot receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

1157.3. Employers shall maintain accurate and current payroll lists containing the names and addresses of all their employees, and shall make such lists available to the board upon request.

1158. Whenever an order of the board made pursuant to Section 1160.3 is based in whole or in part upon the

facts certified following an investigation pursuant to Sections 1156.3 to 1157.2 inclusive, and there is a petition for review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under Section 1160.8 and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

1159. In order to assure the full freedom of association, self-organization, and designation of representatives of the employees own choosing, only labor organizations certified pursuant to this part shall be parties to a legally valid collective-bargaining agreement.

CHAPTER 6. PREVENTION OF UNFAIR LABOR PRACTICES AND JUDICIAL REVIEW AND ENFORCEMENT

1160. The board is empowered, as provided in this chapter, to prevent any person from engaging in any unfair labor practice, as set forth in Chapter 4 (commencing with Section 1153) of this part.

1160.2. Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the board, or any agent or agency designated by the board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the board or a member thereof, or before a designated agency or agencies, at a place therein fixed, not less than five days after the serving of such complaint. No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such

complaint may be amended by the member, agent, or agency conducting the hearing, or the board in its discretion, at any time prior to the issuance of an order based thereon. The person so complained against shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the board, any other person may be allowed to intervene in the proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the Evidence Code. All proceedings shall be appropriately reported.

1160.3. The testimony taken by such member, agent, or agency, or the board in such hearing shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board, upon notice, may take further testimony or hear argument. If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part. Where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If, upon the preponderance of the testimony taken, the board shall be of the opinion that the person named in the complaint has not engaged in or is not engaging in any unfair labor practice, the board

shall state its findings of fact and shall issue an order dismissing the complaint. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the board, or before an administrative law judge thereof, such member, or such administrative law judge, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the board, and, if no exceptions are filed within 20 days after service thereof upon such parties, or within such further period as the board may authorize, such recommended order shall become the order of the board and become effective as therein prescribed.

Until the record in a case shall have been filed in a court, as provided in this chapter, the board may, at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

1160.4. The board shall have power, upon issuance of a complaint as provided in Section 1160.2 charging that any person has engaged in or is engaging in an unfair labor practice, to petition the superior court in any county wherein the unfair labor practice in question is alleged to have occurred, or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the board such temporary relief or restraining order as the court deems just and proper.

1160.5. Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) of subdivision (d) of Section 1154, the board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless within 10 days after notice that such

charge has been filed, the parties to such dispute submit to the board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

1160.6. Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (1), (2), or (3) of subdivision (d), or of subdivision (g), of Section 1154, or of Section 1155, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the board, petition the superior court in the county in which the unfair labor practice in question has occurred, is alleged to have occurred, or where the person alleged to have committed the unfair labor practice resides or transacts business, for appropriate injunctive relief pending the final adjudication of the board with respect to the matter. The officer or regional attorney shall make all reasonable efforts to advise the party against whom the restraining order is sought of his intention to seek such order at least 24 hours prior to doing so. In the event the officer or regional attorney has been unable to advise such party of his intent at least 24 hours in advance, he shall submit a declaration to the court under penalty of perjury setting forth in detail the efforts he has made. Upon the filing of any such petition, the superior court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper. Upon the filing of any such petition, the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony. For the purposes of this

section, the superior court shall be deemed to have jurisdiction of a labor organization either in the county in which such organization maintains its principal office, or in any county in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate, the procedure specified herein shall apply to charges with respect to paragraph (4) of subdivision (d) of Section 1154.

1160.7. Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subdivision (c) of Section 1153 or subdivision (b) of Section 1154, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under Section 1160.6.

1160.8. Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the court of appeals having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein such person resides or transacts business, by filing in such court a written petition requesting that the order of the board be modified or set aside. Such petition shall be filed with the court within 30 days from the date of the issuance of the board's order. Upon the filing of such petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board within 10 days after the clerk's notice unless such time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board such temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board.

The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

An order directing an election shall not be stayed pending review, but such order may be reviewed as provided in Section 1158.

If the time for review of the board order has lapsed, and the person has not voluntarily complied with the board's order, the board may apply to the superior court in any county in which the unfair labor practice occurred or wherein such person resides or transacts business for enforcement of its order. If after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person refuses to comply with the order, the court shall enforce such order by writ of injunction or other proper process. The court shall not review the merits of the order.

1160.9. The procedures set forth in this chapter shall be the exclusive method of redressing unfair labor practices.

CHAPTER 7. SUITS INVOLVING EMPLOYERS AND LABOR ORGANIZATIONS

1165. (a) Suits for violation of contracts between an agricultural employer and an agricultural labor organization representing agricultural employees, as defined in this part, or between any such labor organizations, may be brought in any superior court having jurisdiction of the parties, without respect to the amount in controversy.

(b) Any agricultural labor organization which represents agricultural employees and any agricultural employer shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of this state. Any money judgment against a labor organization in a superior court shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual

member or his assets.

1165.2. For the purpose of this part, the superior court shall have jurisdiction over a labor organization in this state if such organization maintains its principal office in this state, or if its duly authorized officers or agents are engaged in representing or acting for employee members.

1165.3. The service of summons, subpoena, or other legal process of any superior court upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

1165.4. For the purpose of this part, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

CHAPTER 8. LIMITATIONS

1166. Nothing in this part, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on such right.

1166.2. Nothing in this part shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this part shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

1166.3. (a) If any provision of this part, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this part, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

(b) If any other act of the Legislature shall conflict with the provisions of this part, this part shall prevail.

SEC. 3. No appropriation is made by this act, nor is any obligation created thereby under Section 2231 of the Revenue and Taxation Code, for the reimbursement of any local agency for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on or performed by it by this act.

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of November, A.D. 1978.

Supreme Court, U. S.
FILED
JAN 4 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, Governor of the State of Arizona, et al.,
Defendant Appellants,
and
ARIZONA FARM BUREAU FEDERATION, an Arizona corporation, et al.,
Intervenor Appellants,
v.
UNITED FARM WORKERS NATIONAL UNION on behalf of itself and its members, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF AMICUS CURIAE, AGRICULTURAL LABOR RELATIONS BOARD

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF AMICUS CURIAE, AGRICULTURAL LABOR RELATIONS BOARD

This brief is filed with the written consent of all parties pursuant to Rule 42 of this Court.

INTEREST OF THE AMICUS CURIAE

The Agricultural Labor Relations Board (hereinafter, "ALRB" or "Board") is a California administrative

agency established in 1975 to enforce the California Agricultural Labor Relations Act (hereinafter "ALRA"). During the course of the instant litigation in the district court, the parties and the court frequently compared the challenged Arizona Agricultural Employment Relations Act (hereinafter "AERA") to the California ALRA.

An amicus curiae brief urging reversal of the district court decision has been filed by the Agricultural Producers Labor Committee and the South Central Farmers Committee, two trade associations representing California agricultural employers. Their brief (hereinafter, "California employers' brief") contends that affirmance of the district court opinion would threaten the constitutionality of many of the ALRA's provisions. Their claims are based on an out-of-context reading of the district court opinion, coupled with a distorted view of the ALRA.

The ALRB believes that the California act conforms to the constitutional guidelines enunciated by the district court and that affirmance of the decision would not affect the ALRA's constitutionality. The Board further believes that there must be a response to the erroneous claims of the California employers so that, in considering the important questions raised by this case, the Court will not be distracted by false issues. As the agency administering the California act, the ALRB is in the best position to make that response.

ARGUMENT

Introduction

A brief explanation of the functioning of the ALRA is necessary to understand the differences between the California and Arizona statutes and the reasons why affirmance of the district court decision would not affect the ALRA.

The California act grants employees organizational and bargaining rights (Cal. Lab. Code § 1152); provides for secret ballot elections to select a collective bargaining representative or no union (Cal. Lab. Code §§ 1156–9); and characterizes a variety of acts by employers and labor organizations as unfair labor practices. (Cal. Lab. Code §§ 1153–1155.7.) While modeled in some respects on the National Labor Relations Act, the ALRA's election provisions are significantly different from those under the NLRA, reflecting the exigencies of a seasonal industry with a mobile workforce.

The ALRA election process is triggered by the filing of a petition accompanied by authorization cards signed by a majority of the currently employed employees in the bargaining unit. (Cal. Lab. Code § 1156.3(a).) The bargaining unit generally includes all agricultural employees of an employer; however, where the employees work in two or more noncontiguous geographical areas, the Board is given discretion to determine the appropriate unit. (Cal. Lab. Code § 1156.2.) A representation petition is timely only when the employer's payroll reflects at least 50 percent of

peak agricultural employment for the current calendar year. (Cal. Lab. Code §§ 1156.3(a)(1); 1156.4.) If the Board, after investigation, concludes that a question of representation exists, it must direct a secret ballot election within seven days of the filing of the petition. (Cal. Lab. Code § 1156.3(a).) All agricultural employees who worked during the payroll period preceding the filing of the petition are eligible to vote. (Cal. Lab. Code § 1157.) An agricultural employee is defined as any employee engaged in agriculture. (Cal. Lab. Code § 1140.4(b).)

Within five days after an election, any person may file a petition asserting that allegations made in the representation petition were incorrect, that the Board improperly determined the geographical scope of the bargaining unit, or that conduct occurred which affected the results of the election. These objections are considered at a hearing. (Cal. Lab. Code § 1156.3(c).) Unless the Board finds that there are sufficient grounds to refuse to do so, it must certify the election. (*Id.*) The Board may not direct an election in any bargaining unit where a valid election has been held in the past twelve months. (Cal. Lab. Code § 1156.5.)

The California act contains no express provision concerning access. However, the Board has promulgated a regulation permitting non-employee organizers a limited right of access to an employer's property at the worksite for organizing purposes. (8 Cal. Admin. Code § 20900.) This rule is based on the Board's interpretation of the statement of employee rights in

California Labor Code section 1152, in light of the ALRB's findings concerning the general absence of alternative means to communicate with farmworkers. (*NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).) The Board has also interpreted section 1152 as authorizing visits by non-employee organizers to employees living in privately-owned camps. (See, e.g., *Vista Verde Farms,* 3 ALRB No. 91 (1977); *Anderson Farms Company,* 3 ALRB No. 67 (1977).)

I. The California Act Maximizes Employee Participation in the Voting Process

A. The ALRA's Peak Requirement Ensures That Elections Are Held When Most Employees Are Present

The district court held that the representation provisions of the Arizona statute were unconstitutional because they failed to ensure that elections could be petitioned for and conducted during peak employment when most employees would be present to vote. The court found that the AERA's pre-election procedures were so protracted that they could not be completed during the brief periods of peak employment, virtually guaranteeing that the majority of employees would have finished work and left their places of employment before an election could be held. In the words of the district court, the AERA's procedures, applied in the context of agricultural labor, "make it impossible for the Agricultural Employment Relations Board to conduct a timely election to effect the purpose of the Act."

(A-25-26.)

By contrast, the ALRA is carefully structured to ensure that elections will be conducted when the workers are present. An election petition under the California act may be filed only when the employer's payroll reflects at least 50 percent of the peak agricultural employment for the current calendar year. (Cal. Lab. Code §§ 1156.4, 1156.3(a)(1).) An election must be held within a maximum of seven days. (Cal. Lab. Code § 1156.3(a).) All challenges to the election are reserved for a post-election hearing. (Cal. Lab. Code § 1156.3(c).) The ALRA emphasizes speedy election proceedings, held at peak, because the California Legislature "recogniz[ed] that agriculture is a seasonal occupation for a majority of agricultural employees, and wish[ed] to provide the fullest scope of employees' enjoyment of the rights in this part." (Cal. Lab. Code § 1156.4.)

Nonetheless, the California employers claim that the ALRA fails to meet the criteria of the district court simply because the California act does not expressly require elections to be held at peak. This highly technical argument ignores the actual functioning of the California act. As a practical matter, the statutory requirements that the petition be filed at peak and that the election be held within seven days make it unlikely that peak will have passed by the time of the election. The Board has held 866 elections since the ALRA became effective in August 1975. In only a few elections has a party contended that the turnout was low because

the election was held after the end of peak. Most such objections have arisen in cases where, because of the flood of petitions during the ALRB's first months, elections were occasionally held beyond the statutory seven-day period. In such cases, where it is shown that low voter turnout resulted from the end of peak, the Board has set aside the election. (See, e.g., *Mapes Produce Co.*, 2 ALRB No. 54 (1976).)

Affirmance of the district court decision might, at most, require the ALRB to invalidate a few additional elections which were not held at peak. It would hardly render unconstitutional a statute designed to concentrate representation procedures during peak employment and which actually holds 98 percent of the elections at peak.

B. The California Act Enhances Voter Eligibility

The district court held that the Arizona statute precluded a "significant and substantial" number of employees from voting because it required an employee to work for the same employer in two successive calendar years in order to be eligible to vote. (A-28.) Additionally, an employee who satisfied the two-year eligibility requirement might still be denied the right to vote if not employed at the time of the election. (A-27-28.) Because, as the court found, many farmworkers work only briefly for a particular employer and do not return to the same employer in successive years (A-16, 28), the AERA's eligibility criteria withheld

voting rights from many agricultural employees.

The ALRA's eligibility provision is entirely different. It establishes no prior-employment requirement, but provides simply that all employees who worked during the payroll period immediately preceding the filing of the representation petition may vote. (Cal. Lab. Code § 1157.) By Board decision, employees who were on vacation or sick leave during the designated payroll are also eligible. (*Rod McLellan Co.*, 4 ALRB No. 22 (1978); *Rod McLellan Co.*, 3 ALRB No. 6 (1977); *Yoder Bros. Inc.*, 2 ALRB No. 4 (1976).) Thus, eligibility under the ALRA is based on present employment directly preceding an election, rather than on employment in previous years. In view of the district court's findings concerning the "migratory and transitory nature of agricultural employment" (A-28), the ALRA's approach maximizes voter eligibility.

Nor is the ALRA vulnerable to constitutional challenge, as the California employers contend, because it precludes employees of long duration from voting if not employed during the pre-election eligibility period. The district court's criticism of the AERA in this respect came in an entirely different context. The Arizona statute imposed a present employment requirement *on top of* a requirement that an employee have worked in the prior calendar year. It was this combination of eligibility barriers, as applied to migrant farmworkers, that the district court held unconstitutional.

Since the California act establishes only a single eligibility criterion, which maximizes eligibility, it

conforms to the district court's constitutional requirements.

C. The California Act's Election Bar Is Valid

The district court found the Arizona law's election bar suspect because it permitted an election held among a small number of permanent employees to bar another election for twelve months even if the employer hired hundreds of seasonal employees later in the same year. This result was possible because the AERA permitted bargaining units to include both permanent and seasonal employees, restricted voter eligibility, and failed to provide for peak season elections. (A-28-29.)

Contrary to the claim of the California employers, the ALRA's election bar (Cal. Lab. Code § 1156.5) could not produce this result. Because of the seasonality and turnover in agriculture, any election bar will prevent some employees from voting who were not working when the election was held. These employees will necessarily be bound by the choice of other workers employed at a different time of year. However, this result is unjust only if—as the district court found likely under the Arizona act—the number of employees voting is unrepresentative.

The ALRA's peak requirement, coupled with its broad definition of voter eligibility, ensures that the single election within a twelve-month period will be held at a time when a high complement of workers is present and eligible to vote. Thus, election results will

reflect the choice of a representative group of employees. Imposition of an election bar in these circumstances is proper, and serves the same salutory purposes as the NLRA's election bar—providing stability in labor relations. (29 U.S.C. § 159(c)(3); see *Brooks* v. *NLRB,* 348 U.S. 96, 100 n. 8 (1954).)

It is possible, as the California employers note, that in crops with particularly high turnover, the number of employees working during the peak payroll period may be less than 50 percent of the total number of workers employed throughout the rest of the year. Thus, if a California grower employs 500 workers in September and 100 different employees in each of the other 11 months of the year, an election conducted in September among the 500 employees will bind the other 1100 employees employed at some point during the year. This is a proper result since the September election, held at peak, is as representative as possible. By contrast, the election bar under the Arizona statute permitted an election among 100 workers in June to bind the 1500 other employees who worked during the rest of the year. It was the likelihood of such grossly unrepresentative elections which rendered the Arizona election bar invalid.

II. The Absence of Explicit Authority for a Bargaining Order Does Not Render the ALRA Unconstitutional

The district court ruled that the Arizona statute was defective because it prohibited the Arizona labor board

from issuing bargaining orders in cases of egregious employer misconduct. (A-19, 29–30.) The court did not hold that bargaining orders are constitutionally mandated in all labor relations statutes, but simply that the AERA's prohibition on such orders was part and parcel of its overall failure to protect First Amendment associational rights.

The California employers contend that affirmance of the decision would straitjacket the ALRB and the California courts into requiring bargaining orders under the ALRA, a result which, they suggest, would not occur without the constitutional compulsion of the instant case.

Although the ALRB has not yet ruled on whether bargaining orders may issue under the California act, on December 21, 1978 an ALRB Administrative Law Officer (the equivalent of an NLRB Administrative Law Judge) held that the ALRA permits such a remedy under appropriate circumstances. Interpreting section 1148 of the California Labor Code, which requires the ALRB to follow applicable NLRA precedents, the Administrative Law Officer held that the NLRB remedy of a bargaining order (see *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575 (1969)) was applicable to the ALRA because the employer had committed such extensive unfair labor practices that the holding of a fair election was impossible. Since California Labor Code section 1153(f) prohibits an employer from recognizing or bargaining with an uncertified union, the Administrative Law Officer recommended that the Board certify the union

whose majority status had been destroyed by the employer's unlawful conduct. (*Harry Carian,* 77-RC-15-C, 77-CE-92-C (1978).)

While the ALRB must finally resolve this issue, this very recent decision simply underscores the prematurity of the California employers' claim that a bargaining order could never issue under the ALRA. The California employers further ignore the fact that the district court's discussion of bargaining orders came in the context of the court's conclusion that the Arizona representation procedures were defective in their entirety. How and in what circumstances the district court's reasoning would apply to the ALRA, a vastly different act, is not before this Court and is purely speculative.

III. Affirmance of the District Court Decision Would Not Affect Access Rights Under the ALRA

The district court held that the access provision of the Arizona statute was unconstitutional because it gave an agricultural employer an absolute right to exclude organizers from his property, including a labor camp which was the functional equivalent of a company town, even where there were no alternative means to communicate with his employees. (A-18, 36-40.) In short, the AERA provision precluded the Arizona labor board from ordering access even where it might prove to be constitutionally required. (*Marsh* v. *Alabama,* 326 U.S. 501 (1946); *Peterson* v. *Talisman Sugar Co.,* 478 F.2d 73 (5th Cir. 1973).)

Contrary to the California employers' claim, the district court did not rule that the Arizona labor board had an obligation to enforce the constitution. Rather, the court held that the State of Arizona could not enact a total prohibition against entry to private property where such an absolute ban cut off all communication with persons living in the agricultural equivalent of a company town.

Unlike the Arizona act, the California ALRA does not purport to prohibit access. Consequently, the district court's reasoning in invalidating the no-access provision of the Arizona statute is inapplicable. The district court decision is irrelevant to access under the California act for other reasons, as well. First, because the decision dealt only with labor camp access and was based on the company town model of *Marsh* v. *Alabama, supra,* it would have no impact on access rights at the worksite which the ALRB enforces by regulation. (8 Cal. Admin. Code § 20900, upheld as constitutional in *ALRB* v. *Superior Court,* 16 Cal.3d 392, app. dism. *sub nom. Kubo* v. *ALRB,* 429 U.S. 802 (1976).)

Second, the labor camp access available in California is grounded in Labor Code section 1152 (*Merzoian Brothers Farm Management Co.,* 3 ALRB No. 62 (1977)) and in the California Constitution. (*United Farm Workers of America* v. *Superior Court,* 14 Cal.3d 902 (1975).) That right is not without restriction but, as the California employers concede, it is functionally as broad as under the First Amendment. Consequently, affirmance of the district court decision would not

broaden the right of labor camp access presently available in California.

IV. Affirmance of the District Court Decision Would Not Affect the ALRA's Prohibitions on Voluntary Recognition

The ALRA makes it an unfair labor practice for an employer to recognize or bargain with a labor organization which has not been certified under the act. (Cal. Lab. Code § 1153(f).) It also forbids a labor organization from picketing an employer for recognition or bargaining unless the union has been certified. (Cal. Lab. Code §§ 1154(g), (h).) These sections would not be affected by affirmance of the district court decision. Although the Arizona AERA contained some provisions which arguably resemble these sections of the California act, they were never discussed by the district court, which made no judgment on their constitutionality. Consequently, affirmance of the district court decision would not threaten the validity of these provisions of the California statute.

CONCLUSION

The ALRB takes no position with respect to the constitutionality of the Arizona farm labor statute. But to argue, as the California employers have done, that the two statutes have merely adopted different approaches to the problems of agricultural labor law and that they survive or fall together, ignores the vast differences between the two acts.

Unlike the Arizona statute, the Agricultural Labor Relations Act was carefully designed to accommodate the migrancy and seasonality of agricultural labor and to insure representative elections. The act's success in this regard is attested by the fact that the ALRB has held over 800 elections, in which nearly 70,000 farmworkers have voted. Affirmance of the district court decision would neither restrict the California Board and courts in interpreting the ALRA, nor threaten the constitutionality of the statute.

Date: December 22, 1978

Respectfully submitted,

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O

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

On Appeal from the United States District Court
For the District of Arizona

BRIEF OF ACLU FOUNDATION OF SOUTHERN CALIFORNIA; ARIZONA CIVIL LIBERTIES UNION; AMERICAN FRIENDS SERVICE COMMITTEE;

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; ARIZONA STATE AFL-CIO; COMMUNICATION WORKERS OF AMERICA; FRESH FRUIT AND VEGETABLE WORKERS LOCAL 78-B, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA AFL-CIO; INTERNATIONAL LADIES GARMENT WORKERS UNION; INTERNATIONAL WOODWORKERS OF AMERICA; LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 383;

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See inside cover.

COLORADO MIGRANT LEGAL SERVICES, INC.; EVERGREEN LEGAL SERVICES, FARMWORKER DIVISION, ON BEHALF OF ERNESTO NALDONADO AND NARCISO JUAREZ; MARICOPA COUNTY LEGAL AID, MIGRANT DIVISION; MIGRANT LEGAL ACTION PROGRAM, INC.; NATIONAL ASSOCIATION OF FARMWORKER ORGANIZATIONS; NEW JERSEY LEGAL SERVICES, MIGRANT DIVISION; OREGON LEGAL SERVICES, FARMWORKER OFFICE;

NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A.; SYNAGOGUE COUNCIL OF AMERICA; UNITED STATES CATHOLIC CONFERENCE; ARIZONA CATHOLIC CONFERENCE; ARIZONA ECUMENICAL COUNCIL; AGRICULTURAL MISSIONS, INC.; BOARD OF DIRECTORS OF THE SISTERS OF CHARITY, B.V.M.; CHURCH WOMEN UNITED; CENTRAL CONFERENCE OF AMERICAN RABBIS; CATHOLIC COMMITTEE ON URBAN MINISTRY; CLARETIAN MISSIONARIES, WESTERN CONFERENCE; COMMISSION ON POVERTY & ECONOMIC JUSTICE, OHIO COUNCIL OF CHURCHES; COUNCIL OF CHURCHES OF SANTA CLARA COUNTY; DEPARTMENT OF MISSIONS, AFRICAN METHODIST EPISCOPAL CHURCH; DEPARTMENT OF CHURCH AND SOCIETY, DIVISION OF HOMELAND MINISTRIES, CHRISTIAN CHURCH (DISCIPLES OF CHRIST); DIVISION OF HUMAN RELATIONS, BOARD OF CHURCH & SOCIETY, UNITED METHODIST CHURCH; FLORIDA CHRISTIAN MIGRANT MINISTRY; FRANCISCAN FRIARS OF CALIF. (PROVINCE OF ST. BARBARA); GENERAL COUNCIL, SISTERS OF ST. JOSEPH OF CARONDELET; ILLINOIS FARM WORKER MINISTRY; LAS HERMANAS; MICHIGAN FARM WORKER MINISTRY COALITION; MICHIGAN COUNCIL OF CHURCHES; NATIONAL MINISTRIES, AMERICAN BAPTIST CHURCHES; NATIONAL

(LIST OF AMICI AND ATTORNEYS FOR AMICI CURIAE CONTINUED ON INSIDE BACK COVER.)

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,
versus
UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

On Appeal from the United States District Court For the District of Arizona

INTEREST OF THE AMICI[1]

This case presents the question whether and to what extent farm labor unions, migrant farm workers and the public may communicate and organize meaningfully regarding substantial

[1]The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court pursuant to Rule 42(2) of the Rules of this Court.

issues of labor dispute within Arizona. The Court's decision, therefore, will necessarily affect organizations and individuals that share interests similar to each of the groups participating here as amici curiae. At the same time, review by this Court will also reach broader issues that concern organized labor, all workers and the public at large.

Amici believe that the large number of interests implicated in this matter is most efficiently served through the submission of one consolidated brief. Accordingly, although the statement of interests is presented in several separate sections below, only one brief follows that statement.

A. *United Automobile Workers and Other Labor Organizations.*

The United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) is a labor organization representing approximately 1.5 million active and retired members throughout the United States. Of these, approximately 2400 UAW members, plus their families, reside in Arizona. As a labor union, the UAW has a fundamental interest in any labor statute, such as the AERA, which affects the rights of workers to organize and bargain collectively. Moreover, the UAW has gained considerable experience with agricultural employment relations legislation in the course of its long, close association with the UFW in California and elsewhere.

Similarly, the other labor organizations participating as amici curiae—Arizona State AFL-CIO; Communication Workers of America; Fresh Fruit and Vegetable Workers Local 78-B, Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO; International Ladies Garment Workers Union; International Woodworkers of America; and Laborers International Union of North America, Local 383—share the

interest and concern expressed by the UAW over the AERA's significant impact on the rights of Arizona's farm workers to organize and bargain collectively.

B. *Religious Organizations.*

For nearly 60 years religious groups have been seeking to serve the needs of seasonal and migrant farm workers as an integral part of their mission responsibility. In providing for worship and in rendering works of charity the churches have been drawn inevitably to the struggle for justice in the fields. "Action on behalf of justice and participation in the transformation of the world fully appear to us as a constitutive dimension of preaching the gospel . . . ." (Roman Catholic Synod of Bishops, 1971).

Catholic, Protestant and Jewish religious leaders have consistently been present during farm worker strikes and boycotts as a witness to and a participant in the legal and moral issues involved in the unionizing efforts of the United Farm Workers of America.

Indeed, representatives of every organization signing this brief have joined in ecumenical delegations to growers, supermarket owners and managers, public groups and consumers. They have stood on picket lines and distributed leaflets. The purpose of these actions has been to describe the plight of farm workers and their families, to communicate the nature of the farm workers' non-violent movement, and to call on corporate decision-makers to use their influence on behalf of beneficial, non-violent social change in our country.

Submission of this brief is consistent with and integral to maintaining the above tradition of social responsibility and fulfilling the above purpose of securing constitutional rights for farm workers.

C. ***Migrant Legal Action Program and Other Migrant Legal Services and Farm Worker Organizations.***

The Migrant Legal Action Program (MLAP) is a national legal services support center funded by the Legal Services Corporation. MLAP provides direct assistance to Legal Services offices throughout the country, including Arizona, on issues affecting migrant and seasonal farm workers. In addition, MLAP advocates directly on behalf of farm worker clients on national policy issues.

MLAP is interested in this action from two points of view. First, MLAP represents, directly or through assistance to local Legal Services offices, many farm workers in Arizona whose constitutional rights and economic needs require affirmance of the decision below. Secondly, as a national policy advocate, MLAP is vitally concerned with protecting the rights of farm workers in every state to organize and bargain collectively free of unduly restrictive state legislation. Therefore, amicus MLAP joins the appellees in requesting the affirmance of the judgment below, invalidating the Arizona Agricultural Employment Relations Act.

Similarly, other farm worker organizations and migrant legal services—National Association of Farmworker Organizations, Colorado Migrant Legal Serivces, Inc., Evergreen Legal Services, Farmworker Division, on Behalf of Ernesto Naldonado and Narcisco Juarez, Maricopa County Legal Aid, New Jersey Legal Services and Oregon Legal Services—share the interest and concern expressed by MLAP.

D. ***American Friends Service Committee.***

The American Friends Service Committee has since 1917 been active in works of humanitarian relief and service, reconciliation among nations and peoples, and programs to overcome discrimination and oppression. The AFSC carries out its work

on behalf of the several branches of the Religious Society of Friends in America. The AFSC has a vital interest in this litigation because of Friends' belief in the infinite worth of each human being and the equality of all human beings in the sight of God. This testimony has led the AFSC to commit a significant portion of its resources to work which seeks to root out the causes of violence in our society which lie in poverty and imbalance of wealth, in exclusion and denial of rights.

Since the early 1950's in California, 1960's in Florida and other East Coast areas, and for the last 10 years in Texas, AFSC has taken part in efforts designed to gain for farm workers a greater degree of control over their living and working conditions. In 1976 the Commonwealth of Pennsylvania contracted with the AFSC for a study of the state role and responsibilities in recognizing farm worker needs and rights.

This experience makes it clear to AFSC that fundamental rights are at stake in the present lawsuit. The Arizona law under review contains extensive barriers to consumer boycotts. AFSC, like many religious groups, supported and participated in the boycotts of grapes and lettuce. The boycotts were an effective and necessary tool to educate the public on issues involved in the farm worker struggle. They were an exercise of free speech in pursuit of economic justice for farm workers. Should the 1972 Arizona law be upheld, the AFSC would be denied the right to such expressions of opinion and beliefs and the right to associate with farm workers and others in their efforts to gain dignity and justice.

This litigation also involves the issue of access to workers on ranches and in camps. Our experience tells us that such access is essential if there is to be any reality to the right of farm workers to join the union of their choice. Such access is also essential to the work of organizations who seek to meet with farm workers on a host of issues of common concern, as does

the AFSC. The AFSC and others who carry out programs with farm workers would suffer severe limitations in effectiveness were we denied access to camps and ranches. Farm workers would suffer a denial of the right to invite and receive visitors in their homes.

E. *ACLU Foundation of Southern California and Arizona Civil Liberties Union.*

For 57 years, the American Civil Liberties Union has devoted itself exclusively to protecting the fundamental civil rights of persons within the United States. The ACLU Foundation of Southern California and the Arizona Civil Liberties Union are regional affiliates of the American Civil Liberties Union.

The ACLU has traditionally supported the rights of labor unions and of workers to organize and bargain collectively to improve conditions of employment. The ACLU Foundation of Southern California, for example, was born out of a labor dispute in which striking workers were denied the right to read the Declaration of Independence on the strike line.

The Arizona Agricultural Employment Relations Act represents an apparent, calculated effort to strip farm workers of the ability to organize meaningfully. As if drafted from a manual authored by organized labor's staunchest foe, the AERA reduces to chance the likelihood of successful union activity in any of the following areas: elections, bargaining, access to workers, organizing campaigns, public support campaigns, strikes and boycotts. Put candidly, if the statute survives constitutional challenge, unions will be unable to represent and to service Arizona farm workers. At the same time, implicitly, fundamental rights of speech and association will have been forfeited at the expense of perhaps this society's most oppressed and powerless class, and in the interest of pure economic motives.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The restrictive provisions of Arizona's Agricultural Employment Relations Act (AERA) directly infringe the speech and association rights of Arizona's farm workers and of its labor organizations and their members. By interfering with the free flow of information concerning agricultural labor relations, the AERA also threatens the First Amendment rights of all members of the public, who have a direct and substantial interest in full and free discussion relating to the conditions affecting Arizona's farm workers and the causes of agricultural labor disputes.

The constitutional defects in the AERA are patent. Although the appellants make an effort to defend the provisions struck down by the three-judge district court, the real issues raised in their appeal are not whether the AERA violates the First Amendment, but whether it was proper for the three-judge court to decide at this time that the AERA imposes unconstitutional restrictions on the appellees' fundamental rights. Indeed, the appellants do not begin their argument concerning the constitutionality of the AERA until well past the mid-point of their opening brief. The major focus of their brief is an attack on the three-judge district court's determination that the appellees' challenge to the AERA satisfies the Article III requirement of a "case or controversy" and its further determination that there was no need to defer decision on the constitutional issues pending construction of the AERA by the Arizona state courts. By concentrating on these issues of justiciability and abstention, the appellants apparently hope to postpone for as long as possible the inevitable invalidation of the AERA.

The first half of amici's brief will demonstrate that the three-judge court correctly decided these important, threshold issues. In the second half of this brief, amici will show that the court properly held that the AERA's restrictions on consumer publicity and its limitations on access between union organizers

and farm workers residing in farm labor camps violate the appellees' First Amendment rights. By thus focusing on these important issues, amici, of course, do not intend to suggest that they are not in full agreement with the three-judge court's resolution of the other constitutional issues raised by the AERA's restrictions on the rights of Arizona's farm workers and farm labor organizations.

A. The AERA is at bottom a criminal statute. Section 23-1392 of the AERA makes criminal violation of any provision of the Act. Thus, the existence of an Article III case or controversy must be measured by the standards enunciated by this Court in the context of federal declaratory actions that challenge the constitutionality of criminal statutes.

A case or controversy is present in such declaratory actions when it is clear that the plaintiff genuinely desires to engage in, or is likely to engage in, the arguably protected activities, and where there is no reason to believe that threat of prosecution to the plaintiff is not credible. The three-judge court's findings of fact and the record upon which those findings were based establish that the appellees have satisfied both of these requirements. Prosecution under the challenged provisions of the AERA is not an imagined fear. Those provisions bear directly upon the constitutionally protected activities of the appellees. They contain proscriptions that the appellees—like the real estate agent in *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), the teacher in *Epperson v. Arkansas,* 393 U.S. 97 (1968), the doctor in *Doe v. Bolton,* 410 U.S. 179 (1973), and the vendor in *Craig v. Boren,* 429 U.S. 190 (1976)—reasonably and necessarily desire to test in order to fulfill their professional responsibilities.

An Article III case or controversy also exists because the AERA is a broad regulatory scheme whose very existence has a direct and immediate impact on the appellees. Again, the three-judge court's findings of fact establish that the AERA has already taken considerable toll upon appellees. Growers,

employers and the AERA-created Agricultural Employment Relations Board have enforced the statute's provisions against the UFW. The enactment and presence of the AERA has in and of itself impaired efforts of the Union and Arizona farm workers to organize.

An Article III case or controversy also exists under this Court's First Amendment overbreadth cases. In cases raising meaningful First Amendment questions, the federal courts are required to pass upon the potential application of a statute to conduct which is not before it, and which may bear no connection to the activities of the party adjudicating the claim. The appellees satisfy the requirements for application of this doctrine. The overbreadth of the AERA is both real and substantial. Indeed, appellees are not concerned with a rare or relatively insignificant application of the provisions of the AERA, but rather complain of the most probable application of these provisions as they in fact affect their rights of expression and association. Accordingly, appellees have presented an overbreadth controversy that is both real and immediate.

Having correctly determined that the appellees' challenge to the AERA presented a live, justiciable controversy, the three-judge district court properly refused to abstain from deciding the substantial federal constitutional questions raised by the language of the AERA. Abstention is a judge-made doctrine that vests discretion in the district court to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law. Abstention is proper, however, only when the underlying state statute is reasonably susceptible of an interpretation that avoids the necessity for constitutional adjudication.

The challenged provisions of the AERA are all unambiguous. None of those provisions is "fairly" or "reasonably" susceptible of a limiting construction that eliminates the constitutional infirmities found by the three-judge court. Even were there uncertain issues of state law, however, abstention

would be inappropriate in view of the delays already suffered by appellees and the significance of the constitutional claims they are advancing in this lawsuit.

B. The three-judge district court's First Amendment holdings are solidly grounded in established law concerning freedom of speech and association and therefore should be affirmed. Meaningful consideration of the constitutionality of Arizona's legislative restrictions on the rights of agricultural workers to organize and to bargain collectively, however, must begin with a general understanding of the economic and social problems confronting those workers.

The abysmal living and working conditions of farm workers have been well-documented. Indeed, concern for their health and well-being has led the federal government to create and fund a variety of special programs designed to ameloriate their working conditions and to satisfy at least some of their basic, human needs. Governmental programs, however, are inherently ineffective; for they fail to address the root causes of farm workers' problems—problems grounded in the grower-farm worker employment relationship. As was true in the industrial context, union organization and collective bargaining, not government aid programs, are needed to create meaningful and lasting improvements in the lives of these workers. Because of the importance of this background information to the constitutional issues now before the Court, amici have attached as an appendix a brief review of some of the voluminous, relevant material published concerning the plight of this country's agricultural workers.

The urgent need for meaningful collective bargaining, demonstrated by the material summarized in the appendix, underscores the intolerable nature of the AERA's restrictions on farm workers' rights to organize and to bargain collectively with Arizona growers. In the second half of this brief, amici

will show that those restrictions are not only an affront to recognized public policy, but also an unconstitutional infringement on the appellees' First Amendment rights.

C. This Court has long recognized that free discussion concerning the nature and causes of labor disputes is indispensable to the effective uses of modern government and that communications relating to labor disputes are fully protected by the First Amendment. This constitutionally mandated public policy encouraging uninhibited debate on all issues underlying labor disputes stands in marked contrast to Section 23-1385(B)(8) of the AERA, which makes criminal any "untruthful" speech directed at ultimate consumers of agricultural products, and Section 23-1385(C) of the AERA, which authorizes growers to deny access between farm workers and union organizers. Each of these sections, in addition, establishes a system of prior restraints that impermissibly restricts the appellees' rights of expression.

Section 23-1385(B)(8) purports to impose a test of truthfulness on the legality under state law of otherwise constitutionally protected speech. Such a test has been unequivocally rejected by this Court. In *New York Times v. Sullivan,* 376 U.S. 254 (1964), the Court held that to provide the breathing space necessary to promote free, uninhibited debate on public issues, a state may impose sanctions only if the questioned statement is made with "actual malice"—that is, with knowledge that it was false or with regardless disregard of the truth. The *New York Times* "actual malice" standard has also been held to be required by federal labor law to guard against "unwarranted intrusion upon free discussion." Far from requiring a showing of "actual malice" before imposing a sanction for "untruthful" speech, Section 23-1385(B)(8) purports to impose liability without fault. Accordingly, this section is an unconstitutional infringement on the appellees' free speech rights.

Section 23-1385(B)(8) may be enforced not only by after-the-fact sanctions, but also by cease-and-desist orders and restraining orders designed to prevent future occurrences of the conduct proscribed by that section. The AERA's procedures thus establish a classic system of prior restraints. No adequate justification for such a restraint has been offered. In fact, the purpose of this restraint on appellees' speech is solely to safeguard private, economic interests. Quite apart from § 23-1385(B)(8)'s overbroad restriction on "untruthful" consumer publicity, therefore, this section was properly held to be facially invalid under the First Amendment.

Section 1385(C) of the AERA is similarly invalid. That section authorizes growers to deny union organizers all access to their land and thus to the farm labor camps in which many agricultural workers reside. Such authorization, under this Court's holding in *Reitman v. Mulkey,* 387 U.S. 369 (1967), impermissibly involves the State in "private" infringements on free expression. The right of a private employer to prohibit all union communications with workers is now one of the basic policies of the State and is therefore unconstitutional.

Quite apart from this state involvment, § 23-1385(C) works an impermissible deprivation of First Amendment rights in view of the three-judge court's findings concerning the nature of farm labor camps. The court found that migrant labor camps were permanent residential communities for the Arizona farm worker. Migrant camps are thus the functional equivalent of the company town in *Marsh v. Alabama,* 326 U.S. 501 (1946); for like the company town, the migrant labor camp so governs its residents' lives that they lose their capacity to interact freely and frequently with the community at large. Accordingly, the fact of private ownership alone cannot forfeit the constitutional rights of the farm labor camp's residents, including the right to communicate with the appellees concerning union organization.

II. APPELLEES' CHALLENGE TO THE CONSTITUTIONALITY OF ARIZONA'S AGRICULTURAL EMPLOYMENT RELATIONS ACT CREATES A LIVE CONTROVERSY AND DOES NOT ATTEMPT TO OBTAIN AN ADVISORY OPINION

The three-judge district court held that appellees' challenge to Arizona's Agricultural Employment Relations Act (AERA) creates a live, Article III case or controversy. (449 F.Supp., at 451-55; Appendix at 462-70.) That holding is consistent with the long line of cases from this Court explaining the case or controversy requirement in declaratory actions against criminal statutes and in actions challenging broad regulatory statutes with direct impact on the litigants. In addition, the three-judge court's case or controversy holding is supported by this Court's decisions in cases challenging regulatory statutes on the grounds of First Amendment overbreadth.

A. *The Agricultural Employment Relations Act Is A Criminal Statute. The Likelihood Of Enforcement Of That Statute Against Appellees' Conduct Is Both Real And Immediate.*

1. Introduction: The Case or Controversy Requirement in Declaratory Actions Against Criminal Statutes.

The purpose of a federal declaratory action which challenges the constitutionality of a criminal statute is to protect a person from prosecution where threat of criminal sanctions will deter that person from engaging in arguably constitutionally shielded activities. It permits the important "issue [to be] raised before rather than after the challenged step is taken, the litigant being enabled to look before he leaps rather than to risk having to pick up the pieces after a leap in the dark." Borchard, Declaratory Judgments 930 (2d ed. 1941).

Case or controversy therefore exists where the constitutional challenge satisfies two requirements:

1. Where it is clear that the plaintiff genuinely desires to engage in, or is likely to engage in, the arguably constitutional activities; and

2. Where there is no reason to believe that threat of prosecution to the plaintiff is not credible. *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 144 n.29 (1974).

The law challenged by the plaintiff-appellees in this case, the AERA, is at bottom, a criminal statute. Section 23-1392 of the Act reads in pertinent part:

> "Any person . . . who violates any provision of this article is guilty of a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than one year or both. . . ."

Appellees UFW, Gutierrez, Alaniz, Varela and Rose have thus stated a case or controversy if this action meets the above requirements. As the following discussion demonstrates, this Court would have to upset its previous decisions and reject its prior reasoning to endorse appellants' argument that no such statement has been made.

2. The Applicable Case Law and Its Supporting Rationale.

Within the last decade this Court has on several occasions examined the case or controversy requirement in the framework of a constitutional challenge to a criminal statute. Just last Term, for example, the Court unanimously found case or controversy where the owner of and the agent for certain real estate brought suit against an ordinance which prohibited the posting of "For Sale" or "Sold" signs. *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977). While the case was pending before the Court of Appeals, the plaintiff owner sold the land at issue. 431 U.S., at 86 n.1. Despite the fact that

the agent had not alleged that he desired to post "For Sale" signs on any other property within Willingboro[2], and despite the fact that the complaint and record contained no mention of any threatened or actual prosecution under the ordinance[3], the Court adjudicated the claim. It thereby held:

> "[A]t least as to petitioner Mellman, the real estate agent, there plainly is an 'immediate prospect,' *Steffel v. Thompson,* 415 U.S. 452, 459-460 (1974), that he will desire to place 'For Sale' signs on other property in Willingboro, and thus there remains a controversy 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' *Maryland Cas. Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941)." 431 U.S., at 86 n.1.

In *Linmark,* then, common sense appreciation of existing circumstances left little doubt that the plaintiff's livelihood demanded that he test the proscription, that enforcement against such conduct was not a fanciful possibility, and that therefore fears of prosecution were not irrational.

The possibility of enforcement must be real and immediate, but it need not be imminent. In *Epperson v. Arkansas,* 393 U.S. 97 (1968), a teacher attacked an anti-evolution statute on vagueness and other First Amendment grounds as prohibiting her from utilizing certain textbooks or from teaching Darwinian theory. The statute reasonably appeared moribund; no prosecutions had ever been recorded under it in its 40 years of existence. Still, the Court held that the law placed the plaintiff in a "literal dilemma," 393 U.S., at 100, and consequently found the controversy properly justiciable:

> "It is possible that the statute is presently more of a curiosity than a vital fact of life in these States. Nevertheless, the present case was brought, the appeal of right is properly here, and it is our duty to decide the issues presented." 393 U.S., at 102.

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[2]See Appendix in *Linmark,* pp. A-2 to A-5.

[3]*Ibid.*

Similarly, Georgia-licensed doctors consulted by pregnant women were held to present an Article III controversy in their suit against the State's abortion laws. *Doe v. Bolton,* 410 U.S. 179 (1973). None of the plaintiff-physicians had ever been prosecuted, nor had any ever been threatened with prosecution. 410 U.S., at 188. Once more, however, this Court refused to dismiss the potential for criminal action against the interested plaintiffs:

> "The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. *Crossen v. Breckenridge,* 446 F.2d 833, 839-840 (CA 6 1971); *Poe v. Menghini,* 339 F.Supp. 986, 990-991 (D. Kan. 1972)." 410 U.S., at 188.

The plaintiff in *Craig v. Boren,* 429 U.S. 190 (1976), was a licensed vendor of 3.2% beer who sought declaratory relief against two Oklahoma statutes that prohibited the sale of such beer to males under the age of 21 and to females under the age of 18. As in the above cases, no prosecutions or threatened prosecutions had at any time been recorded against the plaintiff. Her concern about possible criminal proceedings, however, was held sufficient to require resolution of her federal causes of action:

> "The legal duties created by the statutory sections under challenge are addressed directly to vendors such as appellant. She is obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers' market, or to disobey the statutory command and suffer, in the words of Oklahoma's Assistant Attorney General, 'sanctions and perhaps loss of license.' Tr. of Oral Arg. 41. This Court repeatedly has recognized that such injuries establish the threshold requirements of a case or controversy mandated by Article III." 429 U.S., at 194 (citations omitted).

See also id., at 196 n.5 ("[C]ertainly, no suggestion will be heard that Whitener's anticipatory challenge offends the normal requirements governing such actions.").

Plaintiffs in *Linmark, Epperson, Doe* and *Craig* met the two-pronged test stated previously. In each case the plaintiff desired to engage in, or was likely to engage in, the activity that was alleged as constitutionally protected. Indeed, conduct of this activity was essential to the fulfillment of the litigant's professional responsibility; forbearance would have crippled each plaintiff's moral, ethical or financial livelihood.

Moreover, in each case there was not sufficient reason to believe that threat of prosecution to the plaintiff was not credible. There was not solid enough proof to be confident that law enforcement would ignore its sworn obligation to uphold the law against persons who plainly would be violating it in reasonably notorious fashion. The records contained no pledges from officials that the challenged statutes would be overlooked in plaintiffs' cases.

By comparison, where suits have failed for Article III reasons litigants were typically unable to satisfy one element of the test. Thus, in *Younger v. Harris,* 401 U.S. 37, 42 (1971), appellees Dan, Hirsch and Broslawsky had their cause dismissed where none "claim[ed] that they ha[d] ever been threatened with prosecution, that a prosecution [was] likely, or even that a prosecution [was] remotely possible."

The Court in *Steffel v. Thompson,* 415 U.S. 452, 459 (1974), found an "actual controversy" because the plaintiff alleged threats of prosecution which could not be characterized as "imaginary or speculative." However, the threats centered on activity undertaken by plaintiff in 1970 in protest of the Vietnam War. Since the suit did not reach this Court until four years later, when American involvement had changed mate-

rially, the Court questioned the credibility of a continuing threat. It consequently remanded the case to the District Court "to determine if subsequent events have so altered petitioner's desire to engage in handbilling at the shopping center that it can no longer be said that this case presents a 'substantial controversy'. . . ." 415 U.S., at 460.

Likewise, in *Ellis v. Dyson,* 421 U.S. 426, 434 (1975), the Court remanded under *Steffel* to determine if two petitioners had alleged "a sufficiently genuine threat of prosecution for possible future violations" of a Dallas loitering statute. Notably, Justice Blackmun for the Court expressed skepticism that "a credible threat" endured; he emphasized for guidance of the lower court that counsel for petitioners confessed in oral argument that "they had not been in touch with their clients for approximately a year and were unaware of their clients' whereabouts." *Ibid.*

The Court's approach to Article III problems thus focuses upon what would reasonably appear to be the likely impact of the criminal statute at issue upon the subject plaintiff's desired practice of his alleged constitutional activities. It is strongly subject-oriented, although it does not blink reality. Consistent with the goals of an organized society, the approach "assumes the function of limiting violence, promoting individual security and maintaining a degree of social equilibrium." Borchard, *supra,* at 3. As stated previously and as spelled out in *Steffel, supra,* 415 U.S., at 495, the underlying policy thereby vindicated is a simple but fundamental one:

> "[Where] concern with arrest has not been 'chimerical,' . . . it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. *See, e.g., Epperson v. Arkansas,* 393 U.S. 97 (1968)."

At the same time, faithfulness to this approach insures that the litigation is not "hypothetical or abstract . . . academic or moot . . . [but rather] definite and concrete touching the legal relations of parties having adverse interests." *Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 240-241 (1937). The plaintiff who sincerely wishes to exercise his rights, but rationally perceives that by doing so he undergoes a genuine risk of arrest or prosecution, fairly understands that failure to prevail means that he must either abandon prospective conduct which implicates values important to him or proceed at peril to his liberty. The stakes at issue in his litigation are manifest; the controversy is palpable.

3. The Court's Decisions Applied to the Facts of this Case.

Appellees have presented a controversy which is at least as substantial as those presented by the plaintiffs in *Linmark, Epperson, Doe* and *Craig,* and is significantly different from those presented by the plaintiffs in *Younger, Steffel* and *Ellis.* The AERA, for example, was, by strong implication at least, targeted at appellee UFW. When enacted, the Union had been aggressively organizing farm workers in Arizona for more than five years. Except for the rival International Brotherhood of Teamsters, no other union was active in the fields.

Inevitably, then, the AERA governs the conduct of the UFW in Arizona. This comprehensive law, by design and by its express provisions, covers all aspects of farm labor organizing in the State. The thirteen sections of the Act which the Union challenged in its amended complaint specifically control the work in which it has previously and typically engaged.[4]

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[4]See, e.g.—
§23-1385(B)(7)—prohibitions and restraints on primary boycott speech activities directed to retailers;
§23-1385(B)(8)—prohibitions and restraints on consumer directed speech;
§23-1385(B)(11)—collective bargaining prohibitions and restraints;
§23-1385(B)(12)—prohibitions and restraints on picketing, boycotting or threats thereof;

More particularly, provisions of the AERA which the three-judge court discussed outlaw or enfeeble organizing activities which have been routinely regarded as integral to the UFW's existence. Section 23-1389 of the Act, for instance, defines the exclusive procedures by which the UFW may organize and represent workers for collective bargaining purposes. As alleged, and as substantiated by the court's factual findings,[5] the section operates to preclude the majority of workers of a particular employer from electing bargaining representatives of its choice. It effectively limits the number of workers which a union may organize and excludes from a union's voting ranks peak harvest workers—predictably, those laborers with the greatest stake in a union's efforts. The UFW therefore possesses a sturdy interest in countering elections conducted pursuant to § 23-1389, and in securing recognition through other procedures.[6]

The success of a union in a closely-waged struggle against an employer often depends upon consumer support. Section 23-1385(B)(8) restricts the content of publicity which a union and its supporters may communicate. It denies unions such as the UFW their accustomed use of publicity, and thus impairs campaign efforts in a serious and direct fashion.

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§23-1385(B)(13)—ban on strike by minorities;
§23-1390—temporary restraining orders without notice;
§23-1392—criminal penalties;
§23-1382(2)—definition of employer;
§23-1382(6)—definition of labor dispute;
§23-1385(C)—denial of access;
§23-1389—representational election;
§23-1384—rights of employer; and
§23-1385(D)—collective bargaining restrictions.

[5]449 F.Supp., at 455-457; Appendix, pp. 470-476. See also the testimony of witnesses Cesar Chavez (Appendix, pp. 292-408), and Stanley Lubin (Appendix, pp. 408-447).

[6]Appellees such as Ruben Alaniz and Matilda Verela, farm workers, possess equivalent interests. It is of course their rights to organize and to choose a union, even as peak harvest workers, which are forfeited by the Act.

Union organizing is essentially futile if organizers are deprived of meaningful access to workers. There exists slight hope of enlisting members where organizers are not afforded appropriate opportunity to communicate the benefits of unionizing to potential members. Section 23-1385(C) permits employers who seek to resist the UFW to restrain access to their employees. It thereby curtails union activities which have been historically perceived as central to the performance of its official duties.

Finally, union demands are often realized when they are coupled with the threat or the implementation of a strike or boycott. Section 23-1393(B) furnishes an employer who is the subject of a UFW strike or boycott with a statutory weapon to enjoin such efforts unilaterally.

To the UFW,[7] therefore, prosecution under any of the above provisions of the AERA is not an imagined fear. To endure it must participate in elections, consumer campaigns, organizing drives and strikes. Constitutional or not, the sections at issue adversely bear upon the constitutionally protected activities of the UFW in Arizona. They are proscriptions which the UFW—like the agent in *Linmark,* the teacher in *Epperson,* the doctor in *Doe,* and the vendor in *Craig*—would reasonably and necessarily desire to test in order to fulfill its professional responsibilities.

Moreover, here, unlike the circumstances in any of the above cases, the possibility of prosecution is enlarged because of the interest of a specific and powerful class in the statute's enforcement. The intervention below of appellants Arizona Farm Bureau Federation, Arizona Grape Growers' Association, Vegetable Growers' Association and Yuma Citrus Shippers' Association persuasively testifies that these growers' associations will press hard for execution of the AERA's provisions. In their "Motion and Application to Intervene as Defendants,"

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[7]As a plaintiff the UFW represents its own interests, as well as those of its members. *Allee v. Medrano,* 416 U.S. 802, 813 n.13 (1974).

dated October 1, 1973, these associations stated that they had "assisted in the drafting of the Arizona Agricultural Employment Relations Act, testified on the need for legislation and provided important and valuable resource information to show why the Act was necessary to protect the public interest." (Paragraph IIIe.) Intervenors also characterized their relation to the AERA as follows (Paragraph IIIb):

> "Numerous protections are afforded those employers represented by the intervenor-applicants via this Agricultural Employment Relations Act. *These protections include in part, sanction against unfair labor practices, restrictions on strike and boycott activities, procedures for resolving issues of representations, and criminal sanctions in the Act which provide numerous and important protections for the members of the intervenor-applicants.* Inasmuch as this suit attempts to declare the . . . Act unconstitutional, this lawsuit has a direct and pecuniary effect upon the interest of the intervenor-applicants . . . ." (Emphasis supplied.)

In light of the growers' own perception of the significance of the Act to their own interests, and their sense of the importance of criminal sanctions to those interests, it would be inexcusably naive to expect that they would passively or ineffectually tolerate the statute's violation by the UFW.

Amici argue in Part III that the sections at bar are not so imprecise that the lower court should have abstained. However, conceptually, resolution of this issue is immaterial here. As developed above, the vice of failing to hear anticipatory challenges to criminal statutes is the deterring of arguably privileged conduct by those unwilling to risk arrest and prosecution. If, as amici contend, the law is clear, then the UFW's fears of criminal proceedings are well-taken; the Union must confront a genuine dilemma regarding the exercise of its constitutional rights.

But, even if the law were in fact vague, the UFW's fears would remain rational. So long as the UFW could reasonably interpret the statute to proscribe constitutionally protected

activity, it would reasonably perceive the identical dilemma. Further, even if the UFW believed the law did not control its conduct, it could reasonably presume that law enforcement personnel might entertain a contrary interpretation. *Baggett v. Bullitt,* 377 U.S. 360, 374 (1964); *Keyishian v. Board of Regents of New York,* 385 U.S. 589, 599 (1967). In either case, the foreseeable consequence would be the impairment of appropriate constitutionally protected activities.

4. Appellants' Arguments.

Appellants brush past the argument of amici as if it were an unwanted realization. At page 29 of their brief they state:

> "The lower court and the appellees also rely on *Doe v. Bolton,* 410 U.S. 179 (1973). . . . *Doe v. Bolton* involved a single statutory provision and not a comprehensive regulatory statute. In addition, absent a facial attack, the only way the provision at issue in *Doe v. Bolton* could have been challenged was by the deliberate commission of a criminal act. This is not true in this case."

Amici concede that the AERA is a comprehensive criminal statute and not a single provision. That result, though, is the product of a deliberate decision by the Arizona legislators and the growers' representatives who assisted in the drafting of the Act. While this decision manifestly multiplies the work of courts which must review the law, it does not revise the constitutional analysis. Broad or narrow, a criminal statute is a criminal statute. Article III, section 2 contains no size restrictions.

In addition, it is simply not true that, apart from actions such as this one, the UFW can challenge the law without deliberate commission of a criminal act. As just explained, section 23-1392 of the AERA subjects any person who violates "any provision" of the law to criminal prosecution.

The two decisions most strenuously urged by appellants, *A.F.L. v. Watson,* 327 U.S. 582 (1946), and *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945), do not fortify their position. *Watson* was an abstention case. Its holding relied upon *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941), a landmark abstention opinion. 327 U.S., at 598. On the subject of case or controversy, the Court in fact held that plaintiffs had established a cause of action in equity:

> "[T]he threat of irreparable injury is real not fanciful, immediate not remote. The crux of the matter is the allegation that there is an imminent threat to an entire system of collective bargaining, a threat which, if carried through, will have such repercussions on the relationship between capital and labor as to cause irreparable damage. We conclude for that reason that the bill states a cause of action in equity." 327 U.S., at 595.

See also *id.,* at 593-595.

As analyzed previously, the line which divides the doctrines of case or controversy and of abstention is a clear one. The former is constitutionally required, while the latter is judge-made and discretionary. Each advances different policies.

In *Lake Carriers' Assoc. v. MacMullan,* 406 U.S. 498 (1972), this Court illuminated those differences. At issue there was the Michigan Watercraft Pollution Act of 1970, which the State interpreted as prohibiting the discharge of sewage in Michigan waters and as requiring vessels with marine toilets to have sewage storage devices. Plaintiffs attacked the Act on a variety of constitutional and statutory grounds.

The three-judge court which first heard the case dismissed it for want of a justiciable controversy. 336 F.Supp. 248, 253. It concluded that any opinion reached on the merits would be purely "advisory." *Ibid.*

All members of this Court rejected the lower court's decision, finding that the requirements of Article III, section 2 had been satisfied. Justice Brennan explained:

> "Since, as appellees concede, the Michigan requirements on the discharge of sewage will be preempted when the federal standards become effective, the gist of appellants' grievance is that, according to Michigan authorities, they are required under Michigan law to install sewage storage devices that (1) may become unnecessary once federal standards, authorizing discharge of treated sewage, become applicable or (2) may, in any event, conflict with other state regulations, pending the promulgation and effective date of the federal standards. The immediacy and reality of appellants' concerns do not depend, contrary to what as the District Court may have considered, on the probability that federal standards will authorize discharge of treated sewage in Michigan waters or that other States will implement sewage control requirements inconsistent with those of Michigan. *They depend instead only on the present effectiveness in fact of the obligation under the Michigan statute to install sewage storage devices. For if appellants are now under such an obligation, that in and of itself makes their attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion.* See, e.g., *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945) (existing burden on interstate commerce justiciable controversy in absence of federal pre-emption or other conflicting state laws)." 406 U.S., at 506-507 (footnote omitted; emphasis supplied).

Significantly, though, the Court then proceeded to hold abstention proper. It found, as appellants argue here, that "the challenged state statute is susceptible of 'a construction by the state courts that would avoid or modify the [federal] constitutional question.'" 406 U.S., at 510 (bracket in original). But, unlike appellants, the Court did not muddle doctrines; rather, it directed its argument to a precise conclusion concerning abstention, not case or controversy.

McAdory too has been regarded as an abstention decision. *See, e.g., Zwickler v. Koota,* 389 U.S. 241, 255-256 (1967) (Harlan, J., concurring). Moreover, claims that are crucial here to appellees' argument were not raised by the petitioners in *McAdory.*

Thus, while the UFW argues vigorously that there is a credible threat of prosecution, in *McAdory* the Court observed that "it nowhere appears that the statutory penalties are being . . . threatened or applied." 325 U.S., at 460. Indeed, petitoners' principal contention in *McAdory* was that violation of a challenged provision of the statute at issue could result in their being legally prevented from functioning as unions within Alabama. 325 U.S., at 458-459. The Court, however, found no suggestion within the law of such dire consequences. 325 U.S., at 459. Unlike appellees then, the petitioners in *McAdory* did not "assert or show" that the sanctions complained of otherwise "operate[d] as an injunction restraining freedom of speech or assembly." *Ibid.*

Finally, in *McAdory,* the petitioners represented persons against whom certain of the provisions challenged could not be applied, so as to raise the legal issue sought to be litigated. 325 U.S., at 464-467. Here, by contrast, appellees unquestionably represent the persons against whom sanctions would be sought. Standing to sue is not a problem.

5. **Section 23-1385: The Unfair Labor Practices Provision of the AERA.**

Section 23-1385(B) defines thirteen unfair labor practices in which it is unlawful for a union to engage. Appellees alleged in their amended complaint that five of these practices -- (B)(7), (B)(8), (B)(11), (B)(12), and (B)(13) — could not be constitutionally proscribed.

Amici's analysis demonstrating that the threat of imposition of criminal sanctions establishes a justiciable controversy applies with equal force to these constraints established by Section 23-1385(B). Pursuant to Section 23-1390, for example,

the Agricultural Employment Relations Board may enjoin persons from engaging in any unfair labor practice. Whether enforced by criminal penalties or administrative sanctions, the threat of application of the AERA to the appellees creates a live, Article III controversy. *See, e.g., California v. La Rue,* 409 U.S. 109, 112 n.3 (1972).

B. *The Agricultural Employment Relations Act Is A Broad Regulatory Scheme Which Has A Direct And Immediate Impact On The Appellees.*

1. **The Impact of the AERA upon Appellees.**

Section A establishes that the AERA's threat of sanctions satisfies the case or controversy requirement. In fact, however, even absent this threat this case does not offend Article III principles.

The AERA has already taken considerable toll upon appellees. Growers, employers and the Act-created Agricultural Employment Relations Board have enforced the statute's provisions against the UFW. Existence of the AERA has in and of itself impaired efforts of the Union and Arizona farm workers to organize.

Since passage of the AERA in 1972 eight separate suits have been brought under its provisions against the UFW and its members. The litigation has succeeded on several occasions in halting First Amendment activities such as handbilling and oral conversations. Three times temporary restraining orders were issued against protected expression of the UFW—*ex parte* and without notice to the UFW.

Even more specifically, provisions of the AERA which were held unconstitutional below have been invoked against the UFW. Safeway Stores, Inc., a prominent grocery chain, alleged violations of § 23-1385(B) in securing relief against the UFW's boycott of its stores in June 1973. Two months later, the Agricultural Employment Relations Board filed formal charges against the UFW for violation of § 23-1385(B)(6),

(7) and (8) for the same conduct. Significantly, in the period between these two actions a superior court had found unconstitutional the granting of the first injunction.

A section of a statute, of course, need not be pleaded against a party to register an impact. Testimony below revealed that, as the overall result of the AERA, UFW boycott activities have been markedly curtailed and obstructed. Members and supporters have pulled back from Union campaigns. The Union has suffered loss of both members and collective bargaining agreements which it possessed prior to the law's enactment. Employers who formerly expressed willingness to negotiate have backed off from talks. The relative wages and benefits of Arizona farm workers in comparison to farm workers across the country have worsened. Workers and labor organizations within the State petitioned for only seven elections within the first five years of the law; in neighboring California, workers and groups petitioned for nearly 400 elections within the first five months of the effective date of the California Agricultural Relations Act.

2. **The Applicable Case Law.**

For over a half a century this Court has held that a record such as the instant one creates a justiciable case or controversy. In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), for instance, an Oregon corporation that ran private schools attacked a statute which required all children to attend public schools. The law was passed in 1922, the year of the suit, but was not to become effective until four years later. Nevertheless, the Court adjudicated the plaintiffs' claim since the legislation had already caused a decrease in student enrollment at the corporation's schools with a resulting loss of income. The "injury to appellees was present and very real—not a mere possibility in the remote future." 268 U.S., at 536.

Two years earlier the Court had found a case or controversy where a party brought a pre-enforcement action against a statute based upon a reasonable *assumption* as to

harm to be suffered. *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). At issue there was a West Virginia statute which required oil producing companies within the State to supply domestic demands to the extent needed. Pennsylvania argued that the law would impermissibly interfere with its oil supply.

The suit was brought just a few days after the legislation was passed. "No order under it had been made by the public service commission, nor had it been tested in actual practice." 262 U.S., at 592. Nevertheless, the Court stated that the suit was properly brought:

> " [T]his [the timing of the litigation] does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant states apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." 262 U.S., at 593.
>
> "We regard it as entirely clear that the act is intended to compel the retention within the state of whatever gas may be required to meet the local needs for all purposes, and that its procedural, penal and remedial provisions are amply adequate to accomplish that result. And we think it equally clear from the allegations in the bills now established by the evidence, that the situation when the suits were brought was such that the act directly and immediately would work a large curtailment of the volume of gas moving into the complainant states. Indeed, the conclusion is unavoidable that with the increasing demand in West Virginia, and the decreasing production, the act in a few years would work a practical cessation of the interstate stream." *Id.,* at 594-595.

A similar decision was reached in *Euclid v. Amber Realty Co.,* 272 U.S. 365 (1926), in which the Court examined a newly enacted ordinance passed by the Village of Euclid, Ohio,

establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses and other residences. An owner of a tract of land within Euclid challenged the ordinance under the Fourteenth Amendment. He charged that the entire ordinance unconstitutionally diminished the value of his property, and that prospective buyers were accordingly deterred from purchasing any part of the land.

The owner had made "no effort to obtain a building permit or apply to the zoning board of appeals for relief as [he] might have done under the terms of the ordinance". 272 U.S., at 386. Nevertheless, Justice Sutherland, citing *Pierce, supra,* 268 U.S., at 525, and *Terrace v. Thompson,* 263 U.S. 197, 215 (1923), held that a controversy had been stated:

> "Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear." *Ibid.*

See also *Currin v. Wallace,* 306 U.S. 1, 9 (1939); *Carter v. Carter Coal Co.,* 298 U.S. 238, 287 (1936); *Cherokee Intermarriage Cases,* 203 U.S. 76 (1906).

The principle reflected in the above opinions was summarized and reaffirmed in *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). There, this Court held:

> "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect, *Pennsylvania v. West Virginia,* 262 U.S. 553, 592-593 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 536 (1925); *Carter v. Carter Coal Co.,* 298 U.S. 238, 287 (1936), 'One does not have to await the consummation of threatened injury to obtain preventive relief.' *Pennsylvania v. West Virginia, supra,* at 593." 419 U.S., at 143.

See also Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3532, at p. 254 (1975).

Complementing this principle is this Court's decision in *Jenkins v. McKeithen,* 395 U.S. 411 (1969). *Jenkins* was in part a standing case, so its holding is obviously limited accordingly. But this Court has recognized that standing and case or controversy as argued here share a common nexus: in *Warth v. Seldin,* 422 U.S. 490, 498 (1975), the Court stated that

> "in its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III."

Standing opinions of this Court thus bear upon the instant issue because in reaching conclusions on standing the existence of a case or controversy necessarily must be determined by the Court.

In *Jenkins* the plaintiff, a labor union member, filed suit against a Louisiana statute which created a body called the Labor-Management Commission of Inquiry for the purpose of investigating and finding facts relating to alleged violations of state or federal criminal laws in the labor-management relations field. The Commission was empowered to conduct public hearings concerning such alleged violations; its specific powers included compelling the attendance of witnesses, requiring the production of records and issuing public findings as to whether there was probable cause to believe that criminal violations had occurred. Witnesses were not permitted to cross-examine other witnesses, or to call anyone to testify at the public hearings.

Jenkins challenged the statute on due process and equal protection grounds. He argued that the law denied witnesses "the right to effective assistance of counsel, the right to confrontation, and the right to compulsory process for the attendance of witnesses." 395 U.S., at 421. He did not allege that he was called to appear before the Commission, or that he expected to be called. *Ibid.*

The Court found Jenkins' cause proper for adjudication. Justice Marshall wrote:

> "[I]t is clear that appellant possesses sufficient adversary interest to insure proper presentation of issues facing the court. His allegations, if taken as true, indicate that the Commission and those acting in concert with it have carried out a series of public acts designed to injure him in various ways. Appellant's interest in his own reputation and in his economic well-being guarantee that the present proceeding will be an adversary one.
>
> "We also think that appellant has alleged that the Act's administration was the direct cause of sufficient injury to his own legally protected interests to accord him standing to challenge the validity of the Act. We are not presented with a cause in which any injury to appellant is merely a collateral consequence of the actions of an investigative body . . . . It is no answer that the commission has not itself tried to impose any direct sanctions on appellant; it is enough that the Commission's alleged actions will have a substantial impact on him." 395 U.S., at 423-424 (citations omitted).

The *Pierce-Pennsylvania* series of decisions which were distilled in the *Regional Rail Reorganization Act Cases,* as buttressed by *Jenkins*, strongly supports appellees' argument here. The AERA has harmed appellees, and it continues to harm and to threaten to harm them. Its existence has hamstrung organizing efforts of the Union and of Arizona farm workers in general. Benefits of collective bargaining have been denied to or withdrawn from appellees as the direct and immediate result of the enactment of the AERA.

Moreover, this curtailment of union activity follows from the intent and the content of the law. No meaningful aspect of union organizing and representation is untouched by the AERA. As already discussed, elections, strikes, boycotts, bargaining, campaigns for worker and public support, and

access to laborers are all regulated by the law in a manner that is seriously adverse to union interests. And, as pointed out in the previous section, major growers' associations intervened in this action expressly to preserve these relative benefits which they had drafted and lobbied into law.

Like legislative interference with oil supply, a restrictive zoning plan, or a mandatory public school requirement, the statute at bar reflects an adjustment of interests between parties in competition. Whatever else, the AERA is not a neutral bill: one group—here, the growers and employers—has gained at the expense of another—the farm laborers and farm labor unions. More than in appellants' relied upon opinion of *Watson, supra,* 327 U.S., at 595, the challenged sections of the AERA significantly affect "the entire system of collective bargaining" within Arizona and create "repercussions on the relationship between capital and labor as to cause irreparable damage."

3. Appellants' Arguments.

Appellants' response to all this is to essentially overlook it. They give past enforcement of the statute no weight. Although the President of the UFW, Cesar Chavez, testified based upon experience as to past and prospective injury deriving from the law, appellants omitted scrutiny of this portion of the record. Testimony from respected and experienced experts in the labor area, which confirmed appellees' analysis of the AERA's impact, was dismissed as hopelessly speculative. Indeed, the thrust of appellants' efforts to circumvent the court's finding that from the "examples cited by plaintiff, and not controverted precisely by defendants, it must be concluded that this case is not hypothetical, abstract, or generalized,"[8] is to suggest that the three-judge court believed the wrong evidence. *See generally* Appellants' Brief, pp. 20-21.

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[8] 449 F.Supp., at 452; Appendix, p. 463.

The courts in the decisions cited above found case or controversy absent the quality of real injury evident here and without the benefit of thoughtful expert testimony as offered and accepted below. Their opinions, however, were grounded upon a realistic and sensitive appreciation of the workings of a regulatory statute—a mode of analysis which should not be abandoned here at the urging of appellants.

C. *The Appellees Have Presented An Overbreadth Controversy That Is Presently Both Real and Immediate.*

1. Introduction: Overbreadth, Justiciability and Case or Controversy.

Whether considered under the rubrics of justiciability and standing, or whether considered more narrowly as an issue of case or controversy, this Court has repeatedly given broad hearing to cases which raise meaningful First Amendment overbreadth questions. The rationale for this approach is the "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973).

The balancing of judicial values which is implicit in the overbreadth doctrine follows from appreciation of our larger system of values. As stated in the frequently-cited examination of this Court's development of the doctrine:

> "The overbreadth doctrine is quite clearly outside the pantheon of 'passive virtues.' Rather than serving to postpone and limit the scope of judicial review, it asks that review be hastened and broadened . . . .
>
> "In the end, this departure from the normal method of judging the constitutionality of statutes must find justification in the favored status of rights to expression and association in the constitutional scheme." Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L.Rev. 844, 852 (1970).[9]

[9]Hereinafter this note will be referred to as *Overbreadth Note.*

The "judicial prediction or assumption" which is referred to in *Broadrick* and the basis for "departure" identified in the *Overbreadth Note* are grounded upon a fundamental understanding of human nature and a constitutional ambition for an ordered society. Again, the *Overbreadth Note, supra* at 854, is instructive:

> "A second function of the chilling effect rationale [for the overbreadth doctrine] is to answer directly the argument that courts should not seek to cure statutory overbreadth until a claimant who is himself privileged has pursued normal channels of review. The answer is that persons contemplating privileged action which collides with a law may be discouraged from testing the constitutional issue, though their claim to immunity would presumably be vindicated if they proceeded in the teeth of the statute, and were set upon by the state. Operating against a bold assertion of rights are respect for legality, uncertainty that one's claim of privilege will be held to prevail, consequent fear of statutory penalties and general unwillingness to bear the burdens of litigations."

The overbreadth doctrine thus exacts certain costs. Even beyond concerns of judicial economy, it may work to free convicted persons whose own protected conduct was not burdened by the challenged statute. *See, e.g., Kunz v. New York* 340 U.S. 290 (1951). *See also Aptheker v. Secretary of State,* 378 U.S. 500 (1964); *Terminiello v. Chicago,* 337 U.S. 1 (1949); *Thornhill v. Alabama,* 310 U.S. 88, 96-98 (1940). Where the statute is vague also, it may result in invalidating a law which conceivably might never be applied against protected conduct. See *Baggett, supra,* 377 U.S., at 374; *Keyishian, supra,* 385 U.S., at 599. In either case, it requires a court to pass upon the application of a statute to conduct which is not before it, and which may bear no connection to the past, present, or future activities of the party adjudicating the claim.

As demonstrated below, the constitutional values involved in the instant case justify use of the overbreadth doctrine without imposing the more serious costs which application typically requires. Overbreadth problems spill out of the AERA from every major section which implicates expressive rights. Further, these problems are not abstract to appellees; at present, they strait-jacket the activities of the UFW and the workers which it seeks to represent. See *Zwickler, supra,* 389 U.S. 241; *Overbreadth Note, supra,* at 864 ("Of course, at some point a suit for anticipatory relief may become so abstract that it cannot be said to arise 'in the context of a specific live grievance.' The overbreadth claimant must show some personal interest in the litigation for his suit to go forward. But an overbreadth claim involves a complex of assertions which, if correct, uniquely justify accelerated judicial review."). *See also* Radcliffe, The Case or Controversy Provision 126 (1978).

2. **The Overbreadth Doctrine Applied to this Case.**

The test of overbreadth varies depending upon the First Amendment interests implicated. "[W]here conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick, supra,* 413 U.S., at 615.

The overbreadth of certain sections of the AERA challenged by the UFW is both real and substantial. Indeed, appellees are not concerned with a rare or relatively insignificant application of each section, but rather complain of the most probable application as it in fact affects their rights of expression and association.

In their amended complaint, for example, appellees alleged that Section 23-1385(B)(8) of the Act was overbroad on its face. See Appendix, pp. 30-31. The three-judge court agreed with this claim and held the section unconstitutional on the grounds raised.[10]

[10]449 F.Supp., at 462; Appendix, p. 490.

Section 1385(B)(8) unequivocally prohibits inducing or encouraging an ultimate consumer to refrain from purchasing particular agricultural products "by the use of dishonest, untruthful and deceptive publicity." Appellees charged that while perhaps a statute could legislate against malicious or intentional misrepresentations,[11] Section 23-1385(B)(8) goes much too far, significantly burdening both the UFW's ability to communicate with consumers in typical consumer boycott campaigns and the concomitant ability of the public to obtain information about labor disputes involving the UFW. The attack upon this section then is not the result of creative manipulation of a statute so that "some persons' arguably protected conduct . . . be caught or chilled. . . ." *Broadrick, supra,* 413 U.S., at 618.[12]

Appellees similarly alleged, and the district court similarly held, that the AERA's provisions on access by union representatives to farm laborers were an overbroad infringement on the UFW's rights.[13] Section 23-1385(C) permits employers to refuse to furnish unions "material, information, time, or facilities . . . to communicate with employees of the employer." Appellees conceded that the rights of expression and association must yield appropriately to reasonable restrictions on time, place and manner, but asserted that this section does not establish a constitutional accommodation of the competing interests. They claimed that especially where many migrant agricultural employees live on the employer's facilities during non-work periods, as the court specifically found below,[14] § 1385(C)'s encroachment into constitutionally protected activities directly and manifestly affects unions such as the UFW.[15]

[11]See Part IV for detailed legal analysis of this section.

[12]On its face, Section 23-1385(B)(8) affects pure speech activities such as oral communications and handbilling. Thus, it is arguable whether the "real and substantial" test even applies to this section. *See, e.g., Gooding v. Wilson,* 405 U.S. 518, 520 (1972); *Cohen v. California,* 403 U.S. 15 (1971).

[13]See Appendix, pp. 34-35; 449 F.Supp., at 465, Appendix, p. 496.

[14]449 F.Supp., at 456; Appendix, p. 474.

[15]See Part V for detailed legal analysis of this section.

In response to paragraph 14G of appellees' amended complaint,[16] the court made explicit findings of fact that Arizona workers could not organize or join a union without pursuing the election procedures of the AERA, and that typically "the entire [election] process cannot take place before the majority of the employees [of a particular employer] finish their work and leave their place of employment."[17] Parallel to the approach taken with the sections previously discussed, the appellees acknowledged that both the manner by which union representation is achieved and the conduct of elections are proper subjects for legislation, despite the fact that each area of concern is deeply imbued with First Amendment values. They argued, however, that § 23-1389 is impermissibly overbroad: the reality of the Arizona agricultural industry means that operation of this section effectively deprives the UFW of a meaningful right to associate and represent the majority of farm workers of any particular employer and deprives appellee Alaniz and other farm workers of their right to associate effectively.

Section 23-1393(B) permits an employer to enjoin unilaterally a union strike or boycott upon appropriate application. The private party whose interests are most adverse to the union may thus restrain classic privileged conduct through the exercise of essentially standardless discretionary power.[18] In fact, the quality of overbreadth which appellees associate with this section is so egregious that case or controversy is satisfied without more analysis. As stated by Justice White in *Broadrick, supra,* 413 U.S., at 612-613:

> "Facial overbreadth claims have also been entertained . . . where [expressive or communicative] conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First

[16]See Appendix, pp. 32-33.

[17]449 F.Supp., at 457; Appendix, p. 475.

[18]See Appendix, p. 32.

> Amendment rights. See *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969); *Cox v. Louisiana,* 379 U.S. 536, 553-558 (1965); *Kunz v. New York,* 340 U.S. 290 (1951); *Lovell v. Griffin,* 303 U.S. 444 (1938)."

Here, as noted in appellees' complaint, the individual who can invoke this discretion is not a disinterested official, but rather is the interested party who benefits most from suppression of constitutional activities.

Other provisions of the AERA which were challenged by the UFW, but not addressed by the court, also present weighty problems of overbreadth. Section 23-1385(B)(7) prevents union representatives or supporters from communicating with, encouraging or even attempting to persuade retailers or management personnel regarding a decision whether to handle the product of a struck employer. As interpreted repeatedly by the Board, the section also forbids peaceful handbilling and oral conversations directed at soliciting consumer requests to store personnel to stop handling a product. See Appendix, pp. 85-87; *cf. Broadrick, supra,* 413 U.S., at 618; *Law Students Research Council v. Wadmond,* 401 U.S. 154, 162-163 (1971).

Appellees alleged[19] and proceeded to argue that §23-1385 (B)(7) thus does not properly distinguish between expression which is peaceful, non-coercive and civil, and expression which is violent or coercive. They claimed that the section is overbroad because it prohibits peaceful union communication with those persons within the public with the greatest interest in information regarding a labor dispute.

Section 23-1385(B)(12) proscribes a non-certified union from any picketing and boycotting, or from threatening to engage in either, if union recognition is the object of the expression, where another union has been recognized by the employer, where an election has occurred within the preceding twelve months, or where a petition has been filed. Appellees

[19]See Appendix, pp. 30-31.

asserted that this section too constitutes an overbroad ban on First Amendment communication[20] and pointed by comparison to its carefully tailored counterpart within the National Labor Relations Act, 29 U.S.C §158(b)(7)(c). That latter section contains the following qualifying language of constitutional significance:

> "*Provided further* that nothing in this subparagraph (c) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick, deliver or transport any good or not to perform any services."

Unlike the plaintiffs in *Broadrick,* then, the appellees here have complained of overbreadth which is both real and substantial judged in relation to the AERA's legitimate sweep. The challenged statute in *Broadrick,* §818 of Oklahoma's Merit System of Personnel Administration Act, sought principally to bar meaningful partisan political activities by state employees. Only at the fringes of the Act could one argue that certain allegedly protected activities such as the wearing of political buttons or the use of bumper stickers were impermissibly impaired.

By contrast, the privileged conduct banned by the AERA swallows up the conduct which constitutionally may be prohibited. Each section of the AERA which is contested by the UFW as overbroad forbids activity which is found at the core of the Union's professional activity. The law would proscribe nothing if it did not proscribe this activity; candidly, it is principally what the statute is getting at. See *Hynes v. Mayor of Oradell,* 425 U.S. 610 (1976).

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[20]See Appendix, pp. 30-31.

Accordingly, the instant case could not be more concrete. Broadrick and his two companions complained of overbreadth applications that were far removed from the focus of the statute; and they themselves had engaged in conduct squarely within the statute's legitimate coverage. Appellees, on the other hand, have attacked a law that specifically affects their privileged conduct by virtue of its most common, albeit illegitimate application. More than the parties in cases such as *Kunz* and *Aptheker,* appellees have presented to this Court an overbreadth controversy that is presently both real and immediate.[21]

III. THE THREE-JUDGE DISTRICT COURT PROPERLY REFUSED TO ABSTAIN FROM DECIDING THE SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTIONS RAISED BY THE CLEAR LANGUAGE OF THE ARIZONA AGRICULTURAL EMPLOYMENT RELATIONS ACT

The three-judge district court held that it was not required to defer deciding the important constitutional issues presented by this case until those questions had been passed upon by the Arizona state courts. (Appendix at 460; 449 F.Supp., at 451.) That holding is clearly supported by the decisions of this Court articulating the doctrine of abstention and applying that doctrine to cases involving fundamental First Amendment rights.

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[21]Appellants argue at pages 36-37 that, as a matter of constitutional principle, "neither . . . the extent of the overreach [of a statute] as an absolute matter, nor the comparison between the statute's overreach into protected activity and its applicability to prohibitable activity can be measured in the abstract." They therefore claim that the absence of a record dooms appellees' overbreadth arguments.

This facile proposition runs counter to every First Amendment overbreadth case ever decided. Indeed, this case is exceptional because the claimants complain of overbreadth which in fact implicates their accustomed conduct. As discussed previously, the essence of the overbreadth doctrine is the protection it affords to parties and conduct that are not before the court.

A. *Abstention Is Proper Only In Narrowly Limited, Special Circumstances.*

Last Term the Supreme Court reaffirmed its uniform holdings that individuals seeking relief under 42 U.S.C. §1983 need not present their federal constitutional claims in state court before coming to a federal forum. *Zablocki v. Redhail,* 434 U.S. 374, 379-80 n.5 (1978). In addition, the Court reemphasized that there is no doctrine requiring abstention simply because resolution of a federal question may result in the overturning of a state policy. *Ibid.*

The Court has frequently explained that abstention is a judge-made doctrine, which vests *discretion* in the district court to decline to exercise or postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law. *E.g., Harman v. Forssenius,* 380 U.S. 528, 534 (1965).[22] Such postponement of the obligation to resolve constitutional issues is appropriate, however, only in "narrowly limited, 'special circumstances' justifying 'the delay and expense to which application of the abstention doctrine inevitably gives rise.' *England v. Medical Examiners,* 375 U.S. 411, 418 (1964)." *Kusper v. Pontikes,* 414 U.S. 51, 54 (1973). *Accord, Zwickler v. Koota,* 389 U.S. 241, 248-249 (1967).

Thus, abstention is proper only where it can be "fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication." *Kusper v. Pontikes, supra,* at 55. If the state statute in question, although never interpreted by the state courts, is not "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question," it is the duty of the district court to exercise its jurisdiction and decide the federal constitutional

[22]The Court has consistently held that it is better practice in a case in which abstention is proper for the court to *retain* jurisdiction pending resolution of the state law issues in state court, rather than simply to dismiss the case. *E.g., Zwickler v. Koota,* 389 U.S. 241, 244 n.4 (1967); *Lake Carriers' Assn. v. MacMullan,* 406 U.S. 498, 512-13 (1972).

issues presented. *Baggett v. Bullitt,* 377 U.S. 360, 375-79 (1963); *Harman v. Forssenius, supra,* at 535. *See also Zwickler v. Koota, supra,* at 251 n.14 ("[A]bstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction.").

The Court forcefully illustrated the point that abstention is not required unless the proposed limiting construction is "fair" and "reasonable" in *Procunier v. Martinez,* 416 U.S. 396 (1974). The appellees in *Martinez* had filed a class action on behalf of themselves and all other inmates under the jurisdiction of the California Department of Corrections to challenge, *inter alia,* the constitutionality of administrative regulations relating to censorship of prisoner mail. In both the district court and the Supreme Court the appellants argued that the federal courts should abstain from deciding this issue. Appellants noted that a state statute assured prisoners the right to receive books, magazines and periodicals. Appellants then argued that the interpretation of that statute by the state courts and its application to the regulations governing prisoner mail might avoid or modify the federal constitutional questions presented. 416 U.S., at 402.

The Supreme Court rejected that argument for abstention on the ground that the appellants' suggested interpretation was simply not reasonable:

> "[W]e think it is plain that no reasonable interpretation of § 2600(4) would avoid or modify the federal constitutional question decided below." *Id.,* at 404.

These principles mandating caution in application of the abstention doctrine have particular significance in cases such as the one at bar involving First Amendment questions. *See, e.g., Procunier v. Martinez, supra,* at 404 ("[W]e are mindful of the high cost of abstention when the federal constitutional challenge concerns facial repugnance to the First Amendment."). As explained by Justice Brennan for the Court in *Zwickler v.*

Koota, to require the plaintiff in a First Amendment case to suffer the delay of state court proceedings "might itself effect the impermissible chilling of the very constitutional right he seeks to protect." 389 U.S., at 252. See *Baggett v. Bullitt, supra,* at 378-79.

The appellants' argument for overturning the three-judge court's decision on abstention falls short of satisfying these exacting standards. Simply put, the provisions of the AERA held unconstitutional are neither uncertain nor fairly susceptible of a reading that would avoid the necessity of constitutional adjudication. Accordingly, the three-judge district court's refusal to order abstention was proper.

B. *Appellants Have Failed To Demonstrate The Existence Of "Special Circumstances" That Would Make An Order Of Abstention Proper.*

The appellants' entire legal argument consists of recitation of two general principles and the string citation of seven cases. (Appellants' Brief, at p. 43 & nn.31-32.)[23] The two principles are themselves unobjectionable: (1) statutes should be construed when possible to uphold their validity; and (2) it is the proper function of state courts, rather than federal courts, to construe state statutes. Yet simply stated in the abstract, those principles do not assist in the resolution of the instant case. Determining whether or not to abstain requires an exercise of discretion based on a careful analysis of the circumstances of the particular case before the Court:

[23]In the section of their brief dealing with case or controversy, the appellants cite two additional abstention cases: *A.F.L. v. Watson,* 327 U.S. 582 (1946) and *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945). However, the appellants disregard the established rule that application of the abstention doctrine requires a careful, case-by-case analysis, *e.g., Baggett v. Bullitt,* 377 U.S. 360, 375 (1969), and make no effort to apply the general principles of abstention involved in those cases to the particular circumstances of appellees' challenge to the constitutionality of the AERA.

> "The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exists the 'special circumstances' prerequisite to its application must be made on a case-by-case basis." *Baggett v. Bullitt, supra,* 377 U.S., at 375 (citations omitted).

The appellants have not engaged in the required careful analysis. Instead, they have advanced three broad arguments to support their contention that the district court should have abstained: First, the appellants contend that several of the provisions held unconstitutional by the district court are uncertain and could have been construed so as to avoid the constitutional defects found by the court. Second, they contend that, even though the provisions of the statute are unambiguous, the court should have abstained in order to permit the state courts to save the AERA by imposing procedural and substantive safeguards not found on the face of the statute. Third, the appellants appear to suggest that abstention was proper simply to allow the state courts to have the first opportunity to rule on the appellees' federal claims. As we will demonstrate, none of these arguments has any merit.

1. None of the Provisions Held Unconstitutional Is Fairly Subject To A Limiting Construction.[24]

The appellants' argument for abstention suffers from a fundamental misunderstanding of the doctrine. As explained by this Court in *Procunier v. Martinez,* the federal courts are not required to create ambiguities in clear statutory language in order to manufacture state law issues that will permit deferring

[24]In view of the appellees' challenge to several, different provisions of the AERA, abstention cannot be viewed as an "all or nothing" doctrine. Amici, of course, believe that abstention is not necessary to permit the state courts to resolve any of the purported state law issues raised by the appellants. However, were this Court to agree with the appellants with respect to one or more of those issues, the district court's decision not to abstain as to the other provisions of the AERA, unaffected by state law questions, should be affirmed.

decisions on federal constitutional questions. Nor are they required to adopt unreasonable interpretations of state law to avoid reaching those federal constitutional issues. *Procunier v. Martinez, supra,* at 404; *Zwickler v. Koota, supra,* at 248-49. Yet in urging that abstention was required in the instant case, the appellants are necessarily arguing that the district court should have been willing to go to such extreme lengths in order to avoid reaching the constitutional questions presented by the clear language of the AERA.

The appellants argue that five specific provisions of the AERA are ambiguous. We will show that none of the cited provisions is uncertain. In addition, interpretation of several of the provisions relied upon by appellants was not necessary to the district court's constitutional holdings.

a. *The Definitions of "Permanent" And "Temporary" Agricultural Employees Are Not Uncertain.*

The definitions of both "permanent" and "temporary" agricultural employees in the AERA require employment "during the preceding calendar year." A.R.S. § 23-1382(1).[25] The district court held that the practical effect of this provision, coupled with the AERA's restriction of the right to vote to employees falling within the definition of a permanent or

[25]Section 23-1382(1) provides in part:

"In this article, unless the context otherwise requires:

"1. 'Agricultural employee, permanent' means any employee over sixteen years of age who has been employed by a particular agricultural employer *for at least six months during the preceding calendar year,* engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field. 'Agricultural employee, temporary' means any employee over sixteen years of age who is employed by a particular agricultural employer and who has been so employed *during the preceding calendar year,* engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field." (Emphasis added.)

temporary agricultural employee, was that a particular worker must be employed during two successive harvests before being entitled to vote. (Appendix at 484; 449 F.Supp., at 460.)

In view of the migratory and transitory nature of agricultural employment, the district court found that the categories of employees eligible to vote set forth in the AERA preclude a significant number of employees from selecting bargaining representatives of their own choosing and thus from meaningful participation in the collective bargaining process. (Appendix at 484-85; 449 F.Supp., at 406.) That finding, in turn, formed part of the factual basis for the district court's legal conclusion that the AERA's provisions for employee representation, recognition and election procedures are unconstitutional. (See Appendix at 471-87; 449 F.Supp., at 455-461.)

Although the appellants argue in their brief that the district court adopted the view of this definitional provision that would invalidate the statute (Appellants' Brief, at pp. 38-39), they do not suggest any other interpretation of the statutory language.[26] Instead, they merely note that the section has not yet been interpreted or applied by the state courts or the Agricultural Employment Relations Board. The fact that a statute has not been judicially or administratively construed, however, does not require abstention. *See, e.g., Chicago v. Atchinson, T. &*

[26]The appellants have now apparently abandoned the argument, advanced in their Jurisdictional Statement, that "preceding calendar year" should be interpreted to mean the preceding 365 days, rather than the preceding period from January 1 through December 31. (Jurisdictional Statement, at pp. 20-21.) The suggestion that "preceding calendar year" could be so interpreted is plainly inconsistent with the clear language of the AERA. When the Arizona Legislature wanted to say "preceding twelve months," it knew how to do so. See, *e.g.,* A.R.S. § 23-1385(B)(12)(b), defining prohibited unfair labor practices to include certain picketing "[w]here *within the preceding twelve months* a valid election under § 23-1389 has been conducted." (emphasis added); A.R.S. § 23-1382(2), defining "agricultural employer" as one who employs six or more agricultural employees for a period of thirty days "during the preceding six month period." See also Cohen & Rose, *State Regulation of Agricultural Relations—The Arizona Farm Labor Law—An Interpretive and Comparative Analysis,* 1973 Law & Soc.O. 313, 325.

S.F. Ry., 357 U.S. 77, 84 (1958) (no dispute as to intent and meaning of new city ordinance); *Doud v. Hodge*, 350 U.S. 485, 487 (1956) (holding it improper to dismiss a prayer for an injunction against enforcement of a state statute "simply because the state courts had not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute"). *See generally* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts And The Federal System 991-92 (2d ed. 1973). The definitions of "permanent" and "temporary" agricultural employees are clear and unambiguous. Abstention was not required to permit their interpretation by the state courts.

b. *The Meaning of the AERA's Access Provisions Is Not Uncertain.*

Section 23-1385(C) of the AERA provides that an employer may refuse to make available "materials, information, time, or facilities" to enable a labor organization to communicate with his employees.[27] The district court held that under this provision an employer of migrant farm workers need not provide a time or place for the union to communicate with his workers and that an employer therefore need not allow the union to come upon his property. (Appendix at 493; 449 F.Supp., at 464.) In view of the evidence establishing that the vast majority of farm workers reside in labor camps on property owned by the employer, such an absolute restriction on access to workers was held to constitute an "unconstitutional restriction on the First Amendment exercise of free speech because of private property interests." (*Ibid.*)

[27]The final sentence of Section 23-1385(C) provides:

"No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time, or facilities, to enable such employer or labor organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters or adherents."

The appellants argue that the district court erred in its interpretation of § 23-1385(C). They contend that "[f]acilities does not mean real property." Rather, facilities "means those items that might be used to facilitate communications, such as microphones, platforms, chairs, etc." (Appellants' Brief, at 41.) Accordingly, in their view the section does not mean that an employer may deny access to his property in all cases. (*Ibid.*)

The difficulty with the appellants' proposed interpretation of "facilities" is that it totally ignores the language of Section 23-1385(C), which refers to "materials, information, time, *or* facilities." What appellants describe as "facilities" are in normal English "materials." Accordingly, the term "facilities" must have some additional, significant meaning. *See, e.g., Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, 261 (1975) ("It is axiomatic that all parts of an Act 'if at all possible, are to be given effect.'"). *Accord, Weinberger v. Hynson, Wescott & Dunning*, 412 U.S. 609, 633 (1973); *Arizona v. Superior Court*, 113 Ariz. 248, 249, 550 P.2d 626 (1976) ("The law will be given, whenever possible, such an effect that no clause, sentence or word is rendered superfluous, contradictory or insignificant.").

The intended meaning of "facilities" becomes clear when the language of the section is read together as intended by the Legislature, rather than in isolation as done by the appellants. An employer need not provide materials—for example, chairs and microphones—or information—for example, addresses and telephone numbers of his employees. In addition, he need not furnish "time or facilities" to permit a union to speak to his employees. In context, this use of "facilities" can only mean "place" or "location." And if a grower need not provide a time or place for the union to communicate to his employees, it is equally clear, as found by the district court, that he need not permit the union to come upon his property. (Appendix at 493; 449 F.Supp., at 464. See also Rose, *State Regulation of*

Agricultural Labor Relations—The Arizona Farm Labor Law—A Constitutional Analysis, 1973 Law & Soc.O. 373, 392-93.) In short, Section 23-1385(C) is not "fairly susceptible" of the type of limiting interpretation suggested by the appellants.

c. *There Is No Uncertainty As to the Ability of the Agricultural Employment Relations Board to Issue Bargaining Orders.*

As part of the factual findings that formed the basis for holding the AERA's election provisions unconstitutional, the district court observed that the AERA prohibits the Agricultural Employment Relations Board from issuing an order requiring an employer to bargain with a union unless that union is certified through an election. (Appendix at 475; 449 F.Supp., at 457.) That observation was based on the language of § 23-1389, which provides that an exclusive bargaining representative shall be "selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in a unit appropriate for such purposes," and of § 23-1385(A)(5), which provides that an agricultural employer shall not be required to bargain collectively "until a representative of his agricultural employees has been determined by means of a valid secret election."[28]

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[28]Section 23-1385(A)(5) provides:

"It shall be an unfair labor practice for an agricultural employer:

". . . .

"5. To refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 23-1389. Nothing in this article shall be construed as requiring an agricultural employer to bargain collectively until a representative of his agricultural employees has been determined by means of a valid secret ballot election."

Section 23-1389(A) provides in part:

"A. Representatives selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in a unit appropriate for such purposes shall be the exclusive representative of all the agricultural employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. . . ."

In contrast to the clear language of the AERA restricting the growers' duty to bargain to representatives selected through a valid secret ballot election, Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 of this title." Section 9(a) of the Act, 29 U.S.C. § 159(a), in turn, provides that "[r]epresentatives *designated or selected* for the purposes of collective bargaining by the majority of the employees of a unit appropriate for such purposes shall be the exclusive representatives of all the employees. . . ." (Emphasis added.)

Thus, unlike the roughly analogous provisions of the AERA, neither § 9(a) nor § 8(a)(5) specifies how the bargaining representative is to be chosen. That legislative determination not to specify the manner in which the representative was to be selected served as the basis for this Court's holding that under the NLRA an employer's duty to bargain is not restricted solely to unions whose representative status is certified after an NLRB election, *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 600 (1969), and for its further holding that the NLRB could issue a bargaining order as a remedy for a § 8(a)(5) refusal to bargain where an employer has committed unfair labor practices that have made the holding of a fair election unlikely or that have in fact undermined a union's majority and caused an election to be set aside. *Id.,* at 610-16.

The appellants do not argue that the language of the AERA limiting the growers' duty to bargain to *elected* representatives is uncertain. Nor do they explain how the clear language of the AERA could be reasonably construed to authorize issuance of a bargaining order concerning a non-elected union representative. The appellants simply assert that they "disagree" that the AERA precludes issuance of bargaining orders absent a valid election.

Such a disagreement is an insufficient basis for an order of abstention. Again, while it is true that the state courts have not interpreted the AERA on this point, the fact that a statute has not been judicially or administratively construed does not require abstention. *E.g., Chicago v. Atchison, T. & S.F. Ry, supra; Doud v. Hodge, supra.*

Moreover, even were the AERA unclear as to the authority of the Board to issue a bargaining order in the absence of an election, the district court's finding on this point was not a part of its constitutional decision. The district court invalidated the AERA's provisions for selecting bargaining representatives because of the excessive delays possible under those procedures, coupled with the seasonal nature of agricultural labor. (Appendix at 482; 449 F.Supp., at 459.) The inability of the Agricultural Employment Relations Board to issue bargaining orders was cited *only* to illustrate that an employer had little incentive not to maximize the delay possible under other provisions of the AERA. (Appendix at 475, 486; 449 F.Supp., at 457, 461.) The inability to issue bargaining orders absent a secret election was not itself held invalid.

d. *Application of the Twenty-Day Notice Period of the Arizona Administrative Procedure Act to the AERA Did Not Require Resolution of Uncertain Questions of State Law.*

The three-judge court found, based on the evidence presented at trial, that the election procedures of the AERA are virtually identical to those of the National Labor Relations Act which, in a contested election, require six to seven weeks for completion. (Appendix at 474; 449 F. Supp., at 456.) The court also found that the six to seven week period between the filing of a petition for an election and the holding of an election will be longer than the periods of peak employment during the harvest season for many Arizona crops. The court further found that when this period is added to the three to six weeks of

work that must be done before a petition can be filed, the entire process cannot take place before the majority of employees finish their work and leave their place of employment. (Appendix at 474-75; 449 F. Supp., at 457.) This final factual finding served as the basis for the district court's legal conclusion that the AERA's provisions for selecting bargaining representatives were unconstitutional. (Appendix at 482; 449 F. Supp., at 459.)

One minor aspect of the factual findings related to delay concerned the time between the filing of an election petition and the holding of the required pre-election hearing. The AERA provides no time period for how soon the Board must act. The AERA's only provision on this point states that the Board "shall provide for an appropriate hearing *upon due notice.*" Section 23-1387(C) (emphasis added).

The district court found as a factual matter that under NLRB experience such a pre-election hearing is not held until from fourteen to twenty-one days after the petition is filed. (Appendix at 474; 449 F. Supp., at 457.) The court further found that the same amount of time would be required under the AERA procedure. The court noted that since the AERA did not set a specific time period for holding the hearing, the general provisions of the Arizona Administrative Procedure Act, establishing a 20-day notice period before holding a contested hearing, would apply.

There is no merit to the appellants' argument that this "interpretation" of the interaction of the AERA and the Arizona Administrative Procedure Act involved resolution of an uncertain issue of state law. The district court's analysis of the applicability of the Arizona Administrative Procedure Act was straightforward and reasonable. That Act provides generally that in a contested case all parties shall be afforded an opportunity for hearing after reasonable notice. "Unless

otherwise provided by law, the notice shall be given at least twenty days prior to the date set forth for hearing." A.R.S. § 41-1009. The AERA does not "otherwise provide." It simply calls for "due notice." Thus, the district court held applicable the general provisions of Arizona law defining what notice should be given in such situations—that is, twenty days notice.

The appellants have cited absolutely no authority to indicate that the district court erred in its analysis of the applicability of the Arizona Administrative Procedure Act. They simply argue that the requirement of "due notice," without more, supersedes the generally applicable, specific provisions of the Arizona Administrative Procedure Act requiring twenty days notice. In the absence of any authority, it cannot be said that the AERA is "fairly susceptible" of that interpretation. See *Procunier v. Martinez, supra,* at 404.

More importantly, quite apart from its statement concerning the twenty-day notice period of the Arizona Administrative Procedure Act, the district court found as a *factual* matter that pre-election hearings take between two and three weeks under the comparable NLRB procedures.[29] Thus, any legal issue concerning the applicability of the Arizona Administrative Procedure Act is irrelevant to the decision of the constitutional question raised by delays in the AERA election procedures. Abstention is proper only if there is an uncertain issue of state law *and* resolution of that issue will permit the district court to avoid deciding a constitutional issue. *E.g., Baggett v. Bullitt, supra,* 377 U.S., at 375-379. The question

[29]In a moment of startling candor, the appellants reveal that their real concern in this case is not with the manner in which the district court interpreted state law, but with the way in which it evaluated the evidence presented to it. See Appellants' Brief, at p. 21 ("The court adopts the view of the evidence that in its opinion rendered the statute unconstitutional."). The appellants, however, have not directly raised any factual question on this appeal.

raised by appellants concerning the Arizona Administrative Procedure Act simply has no bearing whatsoever on the federal claims involved in the appellees' lawsuit.

e. *The Meaning of the AERA's Compulsory Arbitration Provisions Is Not Uncertain.*

Section 23-1393(B) of the AERA establishes a scheme of compulsory arbitration that can be invoked only by the growers. The section confers jurisdiction upon the state courts to issue a ten-day restraining order to enjoin a strike or boycott upon application of an agricultural employer. As a condition for the order the employer must agree to submit the issues to binding arbitration; if the parties within two days after the issuance of the restraining order cannot agree upon an arbitrator, "the court shall appoint one to decide the unresolved issues."[30]

The district court found that by its clear language Section 23-1393(B) permits an employer, without the consent of the union, to submit a labor dispute to binding arbitration by an outsider. (Appendix at 498; 449 F.Supp., at 466.) The court held that such unilateral compulsory arbitration denies unions due process since the provision has the impermissible effect of coercing parties to submit to arbitration without their agreement or consent. (*Ibid.*)

[30]Section 23-1393(B) provides:

"In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues . . . ."

The appellants now argue that the language of Section 23-1393(B) is uncertain and that the district court misinterpreted it.[31] Section 23-1393(B), they argue, only requires an employer to agree to arbitration. The union, they contend, can either accept or reject the employer's "offer" to arbitrate.

The appellants' suggested interpretation ignores the clear language of the statute. Section 23-1393(B) nowhere grants to a union the right to refuse arbitration posited by the appellants. Section 23-1393(B) does not require an employer to agree to arbitration *if* the union also agrees. It simply states that the employer must submit the dispute to binding arbitration. Similarly, the court is not authorized to appoint an arbitrator *if* the union agrees to arbitration but is unable to agree with the grower as to an arbitrator. Section 23-1393(B) provides simply and clearly that two days after issuance of a restraining order, if the parties have not agreed to an arbitrator, the court shall appoint one. No element of union consent to any aspect of the arbitration procedure is either expressed or implied by Section 23-1393(B). The compulsory arbitration provision simply is not fairly subject to an interpretation that renders unnecessary the district court's constitutional decision. See *Procunier v. Martinez, supra,* at 404.[32]

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[31]At the time they filed their Jurisdictional Statement, the appellants apparently did not believe the language of § 23-1393(B) was unclear. For although they vehemently argued that the district court erred in holding the section unconstitutional (Jurisdictional Statement, at 39-41), they nowhere suggested its language was unclear or that it had been misinterpreted by the district court. (*See id.,* at 19-24.)

[32]The decision on the constitutionality of the compulsory arbitration provision was wholly separate from the court's holdings on the AERA election procedures, the AERA access provisions and the unfair labor practice provision prohibiting certain publicity directed at the ultimate consumer of agricultural products. As noted at the outset of this section, the propriety of the district court's refusal to order abstention must be evaluated separately with respect to each of these distinct provisions of the AERA.

2. Abstention Should Not Be Ordered To Permit the State Courts to Salvage an Unambiguous Statute.

Section 23-1385(B)(8) makes it an unfair labor practice for a union or its agents "[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by use of dishonest, untruthful and deceptive publicity." The district court held that this section was unconstitutional on its face since it prohibited speech simply because it was not truthful, without requiring any showing of intent or malice on the part of the speaker. Truthfulness, the court held, cannot be made a prerequisite to First Amendment protection. (Appendix at 489; 449 F.Supp., at 462, citing, *inter alia, Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971) and *New York Times v. Sullivan,* 376 U.S. 254 (1964).)

The appellants candidly acknowledge that Section 23-1385(B)(8), on its face, does not provide any of the procedural or substantive safeguards required for a valid prohibition on certain types of speech activity. (See Appellants' Brief, at 40.) Nevertheless, the appellants urge that abstention should have been ordered to permit the Arizona state courts to graft on to the unambiguous language of the statute those safeguards mandated by *New York Times v. Sullivan.* This Court considered and rejected an identical argument for abstention in *Wisconsin v. Constantineau,* 400 U.S. 433 (1971).[33]

The statute involved in *Constantineau* provided that designated persons could forbid the sale or gift of liquor to one who by excessive drinking produces described conditions or exhibited specified traits, such as becoming dangerous to the peace of the community. The chief of police of Hartford, without notice or hearing to Ms. Constantineau, caused to be posted a notice in

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[33]While explaining and arguably limiting its *Constantineau* decision in *Paul v. Davis,* 424 U.S. 693 (1976), the Court did not question or modify in any way that portion of its holding concerning the abstention doctrine.

all retail liquor outlets in Hartford that sales or gifts of liquors to Ms. Constantineau were forbidden for a year. 400 U.S., at 434-35.

The district court held that procedural due process required that an individual, such as Ms. Constantineau, must be given notice of the intent to post her name and an opportunity to present her side of the matter. This Court affirmed the district court's due process holding. *Id.*, at 435-37.

In dissent Justice Black argued that the district court should have abstained to permit the Supreme Court of Wisconsin to limit the posting law by reading into it the type of procedural safeguards the Court held were required by due process. *Id.*, at 444 (Black, J., dissenting). Responding to that argument, the Court flatly rejected the proposed extension of the abstention doctrine to include challenges to unambiguous state statutes even though the state courts might impose limiting constructions to avoid federal constitutional problems:

> "In the present case the Wisconsin Act does not contain any provision whatsoever for notice and hearing. There is no ambiguity in the state statute. There are no provisions which could fairly be taken to mean that notice and hearing might be given under some circumstances or under some construction but not under others. The Act on its face gives the chief of police the power to do what he did to the appellee. Hence the naked question, uncomplicated by an unresolved state law, is whether that Act on its face is unconstitutional. As we said in *Zwickler v. Koota*, 389 U.S. 241, 251, abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim. *Id.*, at 250-251. We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal courts should stay its hand and not decide the question before the state courts decided it." *Id.*, at 439. (Footnote omitted.)

Accord, Procunier v. Martinez, supra, 416 U.S., at 400-401 ("The mere possibility that a state court might declare the prison regulations unconstitutional is no ground for abstention."); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 47 U.S.L.W. 4017, 4018 n.3 (U.S., Dec. 5, 1978) ("Abstention may appropriately be denied, where, as here, there is no ambiguity in the challenged state statute.").

The reasoning of *Constantineau* applies with equal force in the instant case. The naked question, uncomplicated by an unresolved issue of state law, is whether Section 23-1385(B)(8) on its face is unconstitutional. The appellees, therefore, should not be required to present their federal constitutional claim to the state courts.

C. *An Abstention Order Would Be Improper In View Of The Delay Already Suffered By Appellees In The Vindication Of Their Federal Rights.*

In the preceding sections amici have demonstrated that the provisions of the AERA held unconstitutional are neither uncertain nor fairly susceptible of a reading that would avoid the necessity of constitutional adjudication. Even were there uncertain issues of state law, however, abstention would be inappropriate in view of the delays already suffered by appellees and the significance of the constitutional claims they are advancing in this lawsuit.

This Court has repeatedly emphasized that significant delays are inherent in the abstention process, and that abstention thus increases the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court. *E.g., Harris County Commissioners Court v. Moore,* 420 U.S. 77, 83 (1975). Accordingly, where the litigation has already been long delayed, it has held that abstention should not be required. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); see *Procunier v. Martinez, supra,* 416 U.S., at 404. *Accord, Bellotti v. Baird,* 428 U.S. 132, 150 (1976) ("This Court has remarked that the equitable practice

of abstention is limited by considerations of ' "the delay and expense to which application of the abstention doctrine inevitably gives rise." ' ").

In *Hostetter* the Court affirmed the district court's refusal to order abstention, emphasizing that the doctrine of abstention was equitable in origin, vesting discretion in the courts:

> "[E]ven though constitutional issues be involved, 'reference to the state courts for construction of the statute should not automatically be made.' *NAACP v. Bennett,* 360 U.S. 471." 377 U.S., at 328-29.

The Court then held it was a proper exercise of that discretion to refuse to abstain based on the fact that "the litigation has already been long delayed." *Id.,* at 329.

Similarly, in *Procunier v. Martinez,* after rejecting the appellants' suggested interpretation of state law as unreasonable, the Court reinforced its decision not to order abstention by noting the "high cost" of abstention created by the delays inherent in that procedure:

> "Moreover, we are mindful of the high cost of abstention when the federal constitutional challenge concerns facial repugnance to the First Amendment." 416 U.S., at 404.

The same concerns for the dangers of delay found in *Hostetter* and *Martinez* require affirmance of the district court's refusal to abstain in the instant case. As in *Martinez,* the federal constitutional challenge in the case at bar involves facial repugnance to the First Amendment. And as in *Hostetter,* the appellees here have been forced to suffer extended delays in their efforts to vindicate their federal rights.

The instant lawsuit was filed more than six years ago. (Appendix at 1, complaint filed on August 14, 1972.) During much of that time, the AERA was enforced; and the appellees, its members and supporters suffered a denial of important First Amendment rights. (*See generally* Appendix at 79-91.) If abstention is ordered, substantial additional delays can be

expected; for Arizona does not have any certification procedure to permit the expeditious resolution of uncertain issues of state law. *Cf. Bellotti v. Baird, supra,* 428 U.S., at 150-151 (availability of certification procedure greatly simplifies abstention analysis). The "long delay" that concerned the Court in *Hostetter,* by comparison, was approximately *four* years.

The problem of delay is intensified by the fact that a number of the appellees' challenges to provisions of the AERA were not reached by the district court because of its holding that the entire Act was invalid. As to several of those provisions, there can be absolutely no suggestion that construction of the statutory language is necessary to clarify ambiguities.

Accordingly, even were the Court to accept all of appellants' arguments concerning abstention, the district court would nonetheless be required to adjudicate a number of appellees' constitutional claims. An order of abstention under those circumstances would simply increase the costs of litigation and delay ultimate resolution of important constitutional issues without advancing any significant policy of comity or federalism. Indeed, such a piecemeal approach to this lawsuit would frustrate entirely Arizona's efforts to have a comprehensive, coherent policy governing farm labor relations in the state.

D. *Appellees Are Entitled To A Federal Forum In Which To Vindicate Their Federal Rights.*

A careful analysis of the appellants' argument for abstention reveals that the district court's constitutional decisions did not depend upon the resolution of any unclear state law issues. There simply are no ambiguous provisions of the AERA that can be fairly construed so as to avoid deciding appellees' federal claims.

At bottom, the appellants' argument for abstention is based on a belief that the state courts should have the first opportunity to pass upon substantial challenges to a state statute embodying important state policies. As understandable as this desire might be from the State's perspective, abstention

under these circumstances would negate the entire history of the enlargement of the jurisdiction of the federal district courts. *Wisconsin v. Constantineau, supra,* 400 U.S., at 439. As explained in *Zwicker v. Koota,* by giving the district courts original jurisdiction of actions to redress the deprivation under color of state law of any right secured by the Constitution, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. 389 U.S., at 247-48:

> "[A]bstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim. . . . '[W]e would defeat those purposes [of the Civil Rights Act] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court.' For the 'recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.'" *Id.,* at 251-52 (citations and footnotes omitted).

An identical solicitude for plaintiff's choice of a federal forum to hear his constitutional claims was voiced in *Mitchum v. Foster,* 407 U.S. 225 (1972), in which this Court unanimously held that 42 U.S.C. §1983 constituted an "expressly authorized" exception to the anti-injunction statute, 28 U.S.C. § 2283. The Court noted that the legislative history of Section 1983 made it clear that Congress understood it was altering the relationship between the States and the Nation with respect to the protection of federally created rights:

> "The predecessor of § 1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece, the role of the Federal Government as a guarantor

> of basic federal rights against state power was clearly established. Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.,* at 238-39 (footnotes and citations omitted).

The three-judge district court properly discharged its duty in the instant case. There are no unresolved questions of state law affecting the appellees' claims. Accordingly, the court was obligated to decide the important issues of federal constitutional law presented by the clear language of the AERA.

IV. SECTION 23-1385(B)(8) OF THE AGRICULTURAL EMPLOYMENT RELATIONS ACT IMPERMISSIBLY RESTRICTS THE SPEECH OF PARTICIPANTS IN LABOR DISPUTES

This Court has long recognized that full discussion concerning the nature and causes of labor disputes is indispensable to the effective and intelligent uses of modern government. Accordingly, communications relating to labor disputes have been found to be at the core of speech protected under the First Amendment. *E.g., Thornhill v. Alabama,* 310 U.S. 88 (1940); *American Federation of Labor v. Swing,* 312 U.S. 321 (1941). As such, debate on issues arising from labor disputes should be "uninhibited, robust, and wide-open." *New York Times v. Sullivan,* 376 U.S. 254, 270 (1964).

This constitutionally mandated public policy of encouraging free and full discussion on all issues underlying labor disputes stands in marked contrast to Section 23-1385(B)(8) of the AERA, which makes criminal any "untruthful" speech by labor organizations or their agents directed to consumers of agricultural products without requiring any showing that the speaker knew or should have known that the contents of his

communications were "untruthful."[34] The First Amendment, of course, protects far more than purely "true" speech. *See, e.g., New York Times v. Sullivan, supra; Organization For A Better Austin v. Keefe,* 402 U.S. 415 (1971). Accordingly, the three-judge district court properly held that § 23-1385(B)(8) constitutes an impermissible restriction on protected speech. In addition, § 23-1385(B)(8) authorizes imposition of a prior restraint without satisfying the "heavy burden" required for such a restriction on speech activity to be justified. *See, e.g., Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). For this reason, as well, the three-judge court was justified in holding § 23-1385(B)(8) facially invalid under the First Amendment.

A. *The Speech of Parties To A Labor Dispute Is Fully Protected By The First Amendment.*

It is, of course, axiomatic that the protections of the First Amendment extend to advocacy of beliefs and opinions concerning all matters of public concern. *E.g., Thomas v. Collins,* 323 U.S. 516, 531 (1945) ("The rights of free speech and free press are not confined to any field of human interest"). *See also Miller v. California,* 413 U.S. 15 (1973) (the First Amendment protects works of literary, artistic, political or scientific value). Indeed, purely commercial speech of an entirely private nature has been held to be within the ambit of

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[34]Section 23-1385(B)(8) makes it an unfair labor practice for any labor organization or its agents

> "To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name."

In addition, § 23-1392, which applies to a violation of *any* provision of the AERA, makes it a misdemeanor to engage in the conduct proscribed by § 23-1385(B)(8).

the First Amendment. *E.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976). Communications concerning labor problems and union organization, however, have long been held to be at the very core of First Amendment protection because of their direct relationship to the functioning of our governmental processes.

The importance of safeguarding speech concerning employees' rights and union organization was forcefully articulated by the Court in *Thornhill v. Alabama,* in which a state ban on peaceful picketing was invalidated on the express grounds that information concerning labor disputes was fully protected by the First Amendment:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues rasied by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in Senn's Case (301 US at 478): 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' " 310 U.S., at 102-103.

An identical concern for the importance of unfettered discussion of all issues involved in labor disputes is evident in the Court's decision in *American Federation of Labor v. Swing, supra.* The Court there considered the constitutionality of a state injunction prohibiting "peaceful persuasion" in the

absence of a proximate relationship of employees and employer between the parties to a labor dispute. As in *Thornhill,* the Court struck down the state restriction on labor speech as "inconsistent with the guaranty of freedom of speech." 312 U.S., at 325. See also *Staub v. Baxley,* 355 U.S. 313 (1958) (conviction under municipal permit ordinance of union organizer engaged in soliciting employees to join union reversed).

B. *By Permitting Only "Truthful" Speech, Section 23-1385(B)(8) Impermissibly Limits Appellees' Speech Rights.*

The appellants do not seriously dispute that on its face Section 23-1385(B)(8) prohibits a wide-range of constitutionally protected speech. Rather, their argument is that the section is not invalid on its face because there are some applications of its prohibitions against "untruthful" speech that might be constitutionally permissible. *See, e.g.,* Appellants' Brief, at 61 ("it [was] error to hold that under no circumstances could a prohibition against falsehood in a labor setting be sustained"); *id.,* at 62 ("[*NLRB v. Gissel Packing Co.*] clearly rejects the district court's holding that any application of A.R.S. section 1385 B 8 would be unconstitutional.").[35]

The appellants' defense of § 23-1385(B)(8) suffers from a fundamental misunderstanding of facial overbreadth. The question before the Court is not, as appellants would have it, is there any possible conduct within the reach of the statute that

[35]The appellants' reliance on *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), is entirely misplaced. In *Gissel* the Court held that, although an employer has First Amendment rights to communicate his views to his employees, those rights cannot outweigh the equal rights of employees to associate freely. Any balancing of those rights, the Court then held, must take into account the economic dependence of the employees on their employers, and the necessary tendency of employees to pick up subtle, but nonetheless intended, implications of threats of reprisals by the employer. Concern for *employer* coercion, mixed with otherwise permissible communication of views, is no justification for limiting the speech rights of *unions* and their members. Section 23-1385(B)(8) operates only against labor organizations and their agents, *not* employers.

constitutionally may be prohibited. Rather, as discussed in detail in Section II, above, the question that must be answered is whether, on its face, the statute prohibits some significant, constitutionally protected activity. If it does, the statute must be invalidated. *See, e.g., Gooding v. Wilson,* 405 U.S. 518, 520 (1972); *Coates v. City of Cincinnati,* 402 U.S. 611, 614-16 (1971). Indeed, in the typical overbreadth case, the conduct of the party challenging the statute *is* properly regulated by the State. Nonetheless, the litigant can challenge the facial validity of the statute on the grounds that the protected conduct of others, not before the court, is also restricted by the statute:

> "[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attacks demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973).

At most, the plaintiff pursuing a facial attack must demonstrate not that the overbreadth of the challenged statute is "complete," but only that it is both "real" and "substantial" when judged in relation to the statute's plainly legitimate scope. *Id.,* at 615. Measured against this standard, it is readily apparent that § 23-1385(B)(8) is unconstitutional on its face.

1. Truthfulness Is Not A Prerequisite To First Amendment Protection.

Section 23-1385(B)(8) purports to impose a test of truthfulness on the legality under state law of otherwise constitutionally protected speech. Such a test has been unequivocally rejected by this Court. *New York Times v. Sullivan, supra; Organization For A Better Austin v. Keefe, supra.*

In *Sullivan* the Court canvassed authorities ranging from its own prior decisions in *Speiser v. Randall,* 357 U.S. 513 (1958), and *NAACP v. Button,* 371 U.S. 415 (1963), through the writings of Madison and John Stuart Mill, and concluded that truthfulness cannot be made a prerequisite to First Amendment protection:

> "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.'" 376 U.S., at 271 (citations omitted).

The Court then held that "erroneous statement is inevitable in free debate" and, accordingly, held that erroneous statements "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" (*Ibid.*)

By the time the issue of prohibiting "untruthful" speech was before the Court in *Organization For A Better Austin,* the Court considered it "elementary" that no test for truth was constitutionally permissible:

> "It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication." 402 U.S., at 48.

The Court in *New York Times v. Sullivan* explained that simply permitting a speaker to defend himself by proving the truth of his statements would lead to an intolerable decree of self-censorship. 376 U.S., at 278-79. What is constitutionally required, the Court held, is a defense for "erroneous statements honestly made." *Id.,* at 278. Accordingly, to provide the breathing space necessary to promote free, uninhibited debate on public issues, the Court held that the State may impose sanctions only if the questioned statement is made with "actual malice"—that is, with knowledge that it was false or with regardless disregard of whether it was false or not. *Id.,* at 279-80. *Accord, Time, Inc. v. Hill,* 385 U.S. 374, 388 (1967) (constitutional protections for speech and press preclude application of New York statute to allow recovery for false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth); *Vanasco v. Schwartz,* 401 F.Supp. 87 (S.D.N.Y. 1975), *aff'd,* 423 U.S. 1041 (1976)(New York statute and campaign regulations prohibiting misrepresentations unconstitutional because showing of "actual malice" not required).[36]

2. Section 23-1385(B)(8) Impermissibly Restricts "Untruthful" Speech Without Requiring A Showing of "Actual Malice."

Section 23-1385(B)(8) purports to prohibit all speech intended to encourage ultimate consumers from purchasing agricultural products that is "dishonest, untruthful and deceptive." The section thus imposes absolute liability for false statements. There is no opportunity to defend against either criminal charges or administrative sanctions by showing that

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[36]Although *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), held that "actual malice" need not be proved to impose liability in defamation cases involving only private individuals and private issues, this Court has not authorized departure from the *New York Times* standard in any case involving public issues. Moreover, even in wholly private cases, the Court has emphasized that the States may not, as Arizona purports to do with § 23-1385(B)(8), impose "liability without fault" for false statements. *Gertz, supra,* 418 U.S., at 347.

the erroneous statement was honestly made. The State need not prove that the statement was knowing false or that it was made with reckless disregard for the truth. Accordingly, the section was properly held unconstitutional under *New York Times* and its progeny.

The appellants do not directly challenge the three-judge court's constitutional conclusion. Rather, they contend the court erred because it could have abstained to permit the Arizona state courts to read the necessary protections into the face of the statute. In addition, they question the propriety of the court's holding because of the alleged similarity between § 23-1385(B)(8) and certain provisions of the National Labor Relations Act (NLRA).

Appellants' arguments for abstention were fully considered and shown to be without merit in Section III of this brief. Their argument that § 23-1385(B)(8) is constitutional because of similarities to provisions of the NLRA is equally specious.

The relationship of the NLRA to the authority of a State to sanction false speech in labor disputes was expressly considered by this Court in *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966). The Court there held that a civil action for libel under state law may be maintained consistently with the protections contained in the NLRA only if the plaintiff pleads and proves that the defamatory statements were published with knowledge of their falsity or with reckless disregard of whether they were true or false. *Id.,* at 65. Imposition of the protections enunciated in *New York Times v. Sullivan* was held to be necessary to guard against "unwarranted intrusion upon free discussion envisioned by the Act." *Ibid.*

Indeed, although the Court stated that it was adopting the *New York Times* "actual malice" standards in *Linn* "by analogy, rather than under constitutional compulsion," the Court's decision was explicitly motivated by constitutional considerations. Such considerations, the Court held, "weigh heavy here":

> "[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." *Id.,* at 62-63.

The *Linn* Court expressed particular concern that a rule permitting any greater restrictions on speech than those authorized in *New York Times v. Sullivan* would unduly interfere with the spirited and often heated debate ordinarily found in labor disputes:

> "[T]he language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, counter-charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." *Id.,* at 58.

Protection of such robust exchanges of views, the Court stated, was implicit in both constitutional policy and those policies embodied in our federal labor laws. *Id.,* at 62-63. *See also Letter Carriers v. Austin,* 418 U.S. 264 (1974) (federal labor law preempts state law to the extent the State seeks to make actionable defamatory statements in labor disputes published without "actual malice").

In arguing that the policy underlying the NLRA somehow supports the constitutionality of § 23-1385(B)(8), not only do the appellants totally ignore the express holding to the contrary in *Linn,* but also they misstate the language of the Act. The appellants assert that the proviso to § 8(b)(4) of the NLRA, 29 U.S.C. §158(b)(4), authorizes "truthful publicity." They then contend that "[t]here is no practical difference—certainly none of constitutional dimension—between authorizing the truthful and prohibiting the untruthful." (Appellants' Brief, at

59.) The flaw in appellants' linguistic analysis is that they have misquoted the proviso: what is authorized is not simply "truthful publicity," but all publicity "*for the purpose of truthfully advising the public . . . .*"[37]

Unlike § 23-1835(B)(8), the proviso to Section 8(b)(4) incorporates an "intent" requirement. To be sure, the language chosen by the drafters of the proviso differs from that used by the Court several years later in *New York Times v. Sullivan.* But the proviso nonetheless anticipates that a union organizer must be able to defend his erroneous statements on the ground they were honestly made—that is, they were made for the purpose of truthfully informing the public.[38]

In sum, Section 23-1385(B)(8) is directed to the speech of participants in labor disputes—speech recognized by this Court to be of significant public interest. To be consistent with the Constitution—and to be consistent with our federal labor policy—such speech, even if false, can be restricted only if the speaker acted with "actual malice" as defined by this Court in *New York Times v. Sullivan.*

C. *Section 23-1385(B)(8) Is An Invalid Prior Restraint.*

The Agricultural Employment Relations Board, established under the AERA, is authorized by that Act to "prevent" unfair labor practices by issuance of cease and desist orders, § 23-1390(C), and to petition the State courts for enforcement

[37]The appellants' facile discussion of the meaning of the publicity proviso to § 8(b)(4) wholly fails to analyze its relationship to the explicit, prohibitory language of § 8(b)(4) itself, see *NLRB v. Local 760, Fruit and Vegetable Packers (Tree Fruits),* 377 U.S. 58, 63-72 (1964), or to consider this Court's well-established principle of construing the NLRA to prohibit peaceful, speech-related activity for particular ends only when "there is the clearest indication in the legislative history that Congress intended to do so." *Id.,* at 62.

[38]The appellants' citation to *NLRB v. Local 760, Fruit and Vegetable Packers (Tree Fruits),* 377 U.S. 58 (1964), is simply inapposite. The Court in *Tree Fruits* considered only the extent to which peaceful secondary picketing, which is outside the proviso to Section 8(b)(4), is nonetheless lawful under the NLRA. No issue of restricting "untruthful" speech was considered.

of such orders and for any "appropriate temporary relief or restraining order." § 23-1390(E). The AERA thus clearly contemplates use of judicial and administrative orders to prevent the occurrence of speech activity prohibited by § 23-1385(B)(8). The three-judge court, therefore, properly applied cases involving the validity of prior restraints in its constitutional analysis of this section. (449 F.Supp., at 463; Appendix at 490-91.)[39]

Prior restraints are not unconstitutional per se. Nevertheless, this Court has often stated that any system of prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963). It is the party seeking to justify the prior restraint—here the appellants—that "carries a heavy burden of showing justification for the imposition of such a restraint." *Organization For A Better Austin v. Keefe, supra,* 402 U.S., at 419.

In all but the most extreme situations the Court will refuse to restrain speech before the fact, finding that whatever the countervailing interests may be, they are adequately served by criminal penalties or civil damage remedies imposed after freedom to speak has actually been so abused that its immunity is breached. *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175, 180-81 (1968); *Near v. Minnesota,* 283 U.S. 697, 716 (1931).

The nature of this heavy burden of justification carried by prior restraints was described in *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975), in which the Court held that

[39]The appellants do not disagree that application of Section 23-1385(B)(8) can involve a prior restraint on speech, although they offer the additional information that the speech activity there labeled an unfair labor practice can be dealt with by imposition of sanctions for past conduct, as well as by issuance of an injunction against future conduct. See Appellants Brief, at pp.60-61. Nevertheless, the appellants assert that the section does not raise any issue of prior restraint on its face because not *all* possible applications of the statute are prior restraints. The appellants' argument in this regard is supported by neither precedent nor logic.

municipal authorities had abridged the First Amendment rights of a theatrical promoter by denying him access to a municipal facility for the showing of the rock musical "Hair":

> "The presumption against prior restraints is heavier—and the degree of protection broader—than against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Id.*, at 558-59.

The standard for imposing a prior restraint is thus most demanding. Before criminal penalties may be imposed on non-obscene speech, it must be proved that the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444 (1969) (per curiam). And to justify imposition of a prior restraint an even greater showing of need is required. *Southeastern Promotions, Ltd. v. Conrad, supra.*

The threatened publication by the New York Times and the Washington Post of the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" failed to meet this heavy burden notwithstanding claims by the United States that such publication would work serious damage to the national security. *See New York Times v. United States,* 403 U.S. 713 (1971). The threatened injury caused by the speech activity proscribed by §23-1385(B)(8) similarly fails to meet that heavy burden.

In fact, before this Court the appellants offer no justification whatsoever for the authorization of prior restraints under § 23-1385(B)(8). Certainly, the availability of prior restraints is not required to prevent "publication of the sailing dates of

transports or the number and location of troops" during a time of war or national emergency. *Cf. Near v. Minnesota, supra,* 283 U.S., at 716. Nor is it likely that riots or other violence will be incited if § 23-1385(B)(8) prior restraints are unavailable. *Cf. Carroll v. Commissioners of Princess Anne, supra,* at 180. Indeed, it is not reasonable to posit any public injury that will occur if prior restraints are unavailable to enforce § 23-1385(B)(8). The State and the growers simply seek a method of restraining appellees' speech on issues of public interest solely to safeguard private, economic interests. *Cf.* 449 F. Supp., at 463; Appendix at 491.

However effective an injunction might be in preventing such private injury from occurring, our overwhelming, constitutionally-based commitment to free speech prevents use of a prior restraint to accomplish such a result:

> "Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state. Among freemen, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly." *Whitney v. California,* 274 U.S. 357, 377-78 (1927) (Brandeis, J., concurring).

See also *American Federation of Labor v. Swing, supra,* 312 U.S., at 325 (relying in part upon *United States v. Caroline Products,* 304 U.S. 144, 152 n.4 (1937) to invalidate state injunction against peaceful picketing).

Section 23-1385(B)(8) authorizes imposition of a prior restraint without adequate justification. Quite apart from that section's overbroad restriction on "untruthful" consumer publicity, therefore, it was properly held to be facially invalid under the First Amendment.

D. *Appellants Have Not Challenged The Three-Judge Court's Alternative Basis For Invalidating Section 23-1385(B)(8).*

The three-judge district court's holding that § 23-1385(B)(8) violates the First Amendment rests on two distinct and independent grounds. First, as discussed in the preceding subsections of this brief, the court held that the proscription of "untruthful" speech, without additional safeguards for the speaker, was unconstitutional. Second, the court held that § 23-1385(B)(8)'s limitation on consumer picketing by the union solely to situations in which the union has a "primary dispute" with a particular grower impermissibly restricts the right of nonemployees to communicate. (449 F. Supp., at 463; Appendix at 491-92).

The invalidity of such a narrow restriction on permissible picketing, the court held, was directly controlled by this Court's decision in *American Federation of Labor v. Swing, supra,* 312 U.S. 321 (1941). In *Swing,* the Illinois Supreme Court had enjoined picketing by a union on the ground that there was no dispute between the employer and his immediate employees. This Court reversed, holding that the injunction was inconsistent with the First Amendment. The lower court in the case at bar held that, if a primary dispute cannot constitutionally be required for primary picketing to be lawful, it cannot be made a requirement for lawful secondary picketing since the same "right to free discussion" is abridged. Accordingly, on this second, independent ground the three-judge court held that § 23-1385(B)(8) is invalid on its face as violative of the First Amendment.

The appellants have *not* challenged this portion of the three-judge court's decision. With respect to Section 23-1385(B)(8), the Jurisdictional Statement raises only the question whether invalidation of the section based on its prohibition of "untruthful" consumer publicity was correct. (Jurisdictional Statement, at p.3.) No question is presented concerning the court's decision insofar as it was based on the "primary dispute" requirement of that section. *(Ibid.)* Nor is that issue "fairly comprised" within the appellants' statement of questions presented. That issue, therefore, is not now properly before this Court. Rule 15 (c), Rules of the Supreme Court of the United States; *see Phillips Chemical Co. v. Dumas School Dist.,* 361 U.S. 376, 386 n.12 (1960).[40] Accordingly the three-judge court's holding that §23-1385(B)(8) is unconstitutional must stand.

V. SECTION 23-1385(C) OF THE AGRICULTURAL EMPLOYMENT RELATIONS ACT UNCONSTITUTIONALLY IMPAIRS THE RIGHT OF ACCESS BETWEEN FARM WORKERS AND UNION ORGANIZERS

A. *Summary of Argument: The AERA Access Provision Impermissibly Restricts Protected Speech.*

The Arizona Agricultural Employment Relations Act authorizes employers to deny union organizers access to farm labor camps.[41] The three-judge district court in the present case recognized that AERA § 23-1385(C) would inevitably have this result:

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[40]The appellants' brief on the merits also omits any discussion of this alternative, wholly independent basis for invalidating Section 23-1385(B)(8).

[41]The relevant provision reads as follows:

"No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time, or facilities to enable such employer or labor organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters, or adherents."

Ariz. Rev. Stat. Ann. § 23-1385(C).

> "This provision clearly states that an employer of migrant farm workers does not have to provide a time or place when and where the union can communicate with its workers, and it also means that the employer does not have to allow the union to come upon his property. The provision provides a positive tool for a grower employer to keep any one and everyone away from his property." 449 F.Supp., at 464; Appendix, at p. 493.

Based on the unambiguous language of the statute, the court rejected appellants' proposals to reinterpret the provision to apply only to non-employee union organizers, to permit sufficient communication outside of work time and areas, or to distinguish "furnishing facilities" from "granting access." *Id.*, at 464-465; Appendix, at pp. 495-496.

The denial by the State of any right whatsoever to access to farm labor camps violates the First Amendment. Communications concerning labor problems and union organization have long been held to be included within the scope of the First Amendment. *See, e.g., Thomas v. Collins,* 323 U.S. 516, 534-537 (1945); *Hague v. CIO,* 307 U.S. 496 (1939). *See also* Section IV, *supra.*

Specifically, enactment of Section 23-1385(C) significantly involves the State with discrimination against the rights of speech and assembly. *See Reitman v. Mulkey,* 387 U.S. 369 (1967). It reflects a balancing of constitutional interests—the right of access versus private property rights—in which the former interest has been accorded no weight. Indeed, pursuant to Section 23-1385(C) growers are free to cut off access without regard to the opportunities and conditions that in fact exist on their land for organizers to communicate with workers. The law contains no constitutional escape hatch.

Deliberate or not, the section sidesteps the sort of constitutional case-by-case adjudication which typically characterizes controversies between respective parties who directly represent the above interests. *See, e.g., Lloyd v. Tanner,* 407 U.S. 551 (1972) (draft and war protesters vs. owners of a private shopping center); *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S. 308 (1968) (union picketers vs. owners and tenant of private shopping center). It places the State squarely behind unbridled curtailment of expression, and thereby forecloses the opportunity for sensitive application or drafting of trespass laws.

The instant case thus raises no serious question of state action, because it is the State which is sanctioning and promoting the alleged constitutional injury. The only issue, therefore, is whether sufficiently compelling state interests exist to permit the State to silence protected speech in the manner provided by Section 23-1385(C).

However, even aside from this state involvement, Section 23-1385(C) works a constitutional deprivation given the peculiar nature of farm labor camps.

The three-judge court made a finding of fact that

> "[M]uch of the work of reaching agricultural employees must be done on the employer's property, since most agricultural employees are migrants with no permanent residence in the area and live in labor camps on the employer's premises." 449 F.Supp., at 456; Appendix, at p. 474.

Based upon this finding, it then concluded that "a labor camp [is] . . . a functional equivalent of a municipality" (449 F.Supp., at 464; Appendix, at p. 494), and held that reasonable access to such camps was protected under *Marsh v. Alabama,* 326 U.S. 501 (1946), and its progeny. Amici support this determination also.

B. *Application of Reitman v. Mulkey to the Instant Case Requires Invalidation of the AERA Access Provision.*

The present case is governed by this Court's holding in *Reitman, supra.* There, the Court examined two actions in which couples had sued apartment owners for racial dis-

crimination, in one case for refusal to rent an apartment and in the other case for eviction from their apartment. The owners in each matter defended their conduct by resort to Article I, Section 26 of the California Constitution, an initiative measure passed as Proposition 14 in a statewide ballot in 1964. The provision read:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." 387 U.S., at 371.

Proposition 14 thus "establishe[d] 'a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved.'" 387 U.S., at 374 (emphasis in original, quote from the decision below of the California Supreme Court). Justice White expanded:

> "Private discriminations in housing were now not only free from [previous California anti-discrimination statutes] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. All individuals, partnerships, corporations, and other legal entities, as well as their agents and representatives, could now discriminate with respect to their residential real property." 387 U.S., at 377.

The Court agreed with the California court that the "provision would involve the State in private racial discriminations to an unconstitutional degree." 387 U.S., at 378-379. Citing *McCabe v. Atchison, Topeka and Santa Fe R. Co.,*

235 U.S. 151 (1914), *Nixon v. Condon,* 286 U.S. 73 (1932), *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), *Peterson v. City of Greenville,* 373 U.S. 244 (1963), *Lombard v. Louisiana,* 373 U.S. 267 (1963), and *Robinson v. Florida,* 378 U.S. 153 (1964), to "exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations" (387 U.S., at 380), it thus held that the provision at issue

> "was intended to authorize, and does authorize racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discrimination. We have been presented with no persuasive considerations indicating that these judgments should be overturned." 387 U.S., at 381.

Like Proposition 14, Section 23-1385(C) "significantly encourage[s] and involve[s] the State in private discriminations." The right of a private employer to prohibit all union communication with workers "is now one of the basic policies of the State [of Arizona]."

The statute therefore bears no resemblance to a neutral and general criminal trespass statute which is designed to protect overall interests of private property and which has only an occasional impact on privileged activity. Rather, it is censorial in quality—a speech-directed and content-oriented law that singles out exclusively labor speech and expression as absolutely proscribable. And, to repeat, it is the State which backs this license for blanket proscription by lending and stimulating support for growers' denials of access to union organizers.

Moreover, Section 23-1385(C), again like Proposition 14, dramatically altered existing circumstances. Prior to its passage growers had to rely upon their "personal choice" in order to

discriminate against labor speech. Judicial enforcement of this choice depended upon careful scrutiny of the individual facts of each controversy. A right of access was recognized and given due consideration in relationship to countervailing interests of private property.

Now, not only is this right of access effectively eviscerated, but also it is destroyed absent a compelling state interest and by the establishment of a classic system of prior restraints. Pursuant to Section 23-1385(C), growers may bar access whenever they please, without regard to the extant conditions, and upon whatever terms they deem suitable. Therefore, even where the vast majority of an employer's workers live and work on his property, and where organizers have no alternative but to seek to reach the workers on that property, the State will countenance the complete denial of access. As noted, the law will not admit to any constitutional compromise; it is consequently wholly unsupportable.

At the same time, the State permits growers to check speech before it is ever uttered. Irrespective of content, the union organizer may be barred from the expression of his views. The statute cannot sustain the "heavy burden of showing justification for the enforcement of such a restraint." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971).

Significantly, appellants do not defend the Arizona legislature's balancing of values in Section 23-1385(C). Instead, they suggest that courts can enter a limiting construction on the power which the State confers to the private sector. See Appellants' Brief, at pp. 69-73. However, as just pointed out, the bare words of the statute permit no such judicial draftsmanship; like Propostion 14, this law cannot be rewritten to change what it plainly means. Application of an "as applied" approach would strip the section of all intended meaning and redefine it as a general trespass law—precisely the result sought to be avoided by its enactment.

C. *In Light of the Three-Judge Court's Findings of Fact, Marsh v. Alabama Requires Invalidation of The AERA Access Provision.*

Even minus the State's role here as promoter of the complained of constitutional wrong, Section 23-1385(C) works an impermissible constitutional deprivation to appellees. The law, in and of itself, is overbroad. Given the district court's amply supported finding of fact regarding the nature of farm labor camps, the statute prohibits too wide a scope of protected activity, involving freedom of association and speech.

1. Constitutional Basis for Access to Private Property Under the First and Fourteenth Amendments.

The Court in *Marsh v. Alabama, supra,* 326 U.S. 501, first considered the constitutional tension between the rights of access and private property. There, it overturned a criminal trespass conviction of a Jehovah's Witness for distribution of religious literature within Chickasaw, Alabama, a private company town. The town's corporate owner had previously posted notices throughout the community which warned of prosecution for any solicitation.

Justice Black refused to distinguish Chickasaw from public municipalities. He observed that Marsh's act would have been privileged in such municipalities, and found no compelling rationale to reach a different result for a similar community that was privately operated. The Court thus held that town ownership could not forfeit the constitutional rights of its residents:

> "These people, just as residents of municipalities, are free citizens of their state and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties

guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." 326 U.S., at 508.

Central to *Marsh,* therefore, is the principle that isolating conditions of employment which realistically result from workers being compelled to live and work upon their employer's property cannot be exploited by the employer so as to deny those workers access to otherwise privileged communications. Stated differently, no private interest can be permitted to so thoroughly rule a worker's being such that he is meaningfully cut off from information necessary to enrich, enlighten or relieve his life.

Sources cited in *Marsh* emphasize this principle. *See, e.g.,* 326 U.S., at 508 n.5. In one of the publications referenced in the footnote, "Some Southern Cotton Mills Workers and Their Villages," for instance, the author stresses the inherent alienation and remoteness of a company town:

> "The isolated location of the [company] village, further accentuated by the lack of railway facilities, makes impossible ready contact with centers of business and social activity. Even though two well maintained county highways connect the village with the two nearest towns, four miles distance, there is little contact with other people." *Id.,* at 37-39.

Indeed, any other emphasis would impermissibly jeopardize the workers' true and privileged interests. If, for example, it were asserted that the holding in *Marsh* was solely dependent upon the quality of typically governmental services furnished by the private owner, then the shrewd owner would only need to offer few or no services to gain dominion over his employees' rights. As demonstrated below, this in fact describes the situation of most migrant camps, where workers have no choice but to live without many services which society routinely regards as basic.

Understood in this light, the differences between a company town setting and other private property become manifest for the instant purposes. Thus, a shopping center does not implicate the identical interests which a town does. *See Hudgens v. N.L.R.B.,* 424 U.S. 507 (1976). The population and the activities of a shopping center do not resemble those of a community. The lives of a center's patrons and employees do not vitally rely upon that center; it is merely a place to shop or to work. In short, a shopping center, unlike a community town, does not so *govern* a "resident's" life that that individual loses the capacity to interact freely and frequently with the community at large.

2. **Application of Marsh to this Case: Labor Camps are Residential Communities and the Functional Equivalent of Company Towns.**

As quoted above, the district court entered a finding of fact that migrant labor camps were permanent residential communities for the Arizona farm worker. Consistent with this finding and the court's ultimate holding, migrant camps consequently are the functional equivalent of the *Marsh* company town. See *Petersen v. Talisman Sugar Co.,* 478 F.2d 73 (5th Cir. 1973); *Mid-Hudson Legal Services, Inc. v. G & U, Inc.,* 437 F.Supp. 60 (S.D.N.Y. 1977); *People v. Rewald,* 65 Misc. 2d 453, 318 N.Y.S.2d 40, 43 (Cuyauga Co. Ct. 1971).

To begin, migrant workers do live and work in camps and nearby ranches that are owned and operated by their private employers. Residency in these camps is rarely genuinely voluntary; growers typically enforce camp residency as a condition of employment in order that workers are always readily available to meet the growers' needs.[42] When not at work, the

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[42]See R. Schmitt, The Migrant Farmworker Situation in the U.S. 12 (April 17, 1975) (Library of Congress, Congressional Research Service, HD 5856, E.D. 75-115); *see also* Subcomm. on Agricultural Labor, House Comm. on Education and Labor, 94th Cong., 2d Sess., *Federal and State Statutes Relating To Farmworkers* 95-149 (October 1976) (reprinting *R. Schmitt, supra,* in full and surveying federal and state laws on farm labor housing and other farmworkers issues); Rocky Mountain Regional Office, U.S. Commission on Civil Rights, *People Who Follow The Crops* (June 1978).

worker eats, sleeps, and rests at the camp.[43] Since the camp remains the worker's home for most of the year, they are, as the court found, residential communities in all significant respects.[44]

The communities are isolated. Location of grower-controlled housing usually is at a remote site, far removed from heavily travelled roads, stores, transportation, recreation centers, medical clinics, government offices, churches, and other common public services and facilities.[45]

Moreover, the geographical isolation of the migrant is exacerbated by other factors. The lifestyle which is inseparable from the worker's employment contributes to his alienation from the overall society. As summarized in Sherman & Levy, *Free Access to Migrant Labor Camps,* 57 ABAJ 434, 435 (1971):

> "His long workday, general poverty, and limited transportation make it physically difficult for him to leave the camp or the migrant way of life. His transient status denies him a political voice, both in the migrant stream and in his home state, to demand the service to which he is entitled by law . . . . [L]anguage barriers, color, cultural differences and limited education make it clearly impossible for him to establish a really acceptable life even if he were

[43] *Ibid.*

[44] *See Petersen, supra,* 478 F.2d, at 82; *Franceschina v. Morgan,* 346 F.Supp. 833, (S.D. Ind. 1973); *Folgueras v. Hassle,* 331 F.Supp. 615, 620-625 (W.D. Mich. 1971); Comment, *The Bill of Rights, State Action, and Private Migrant Labor Camps,* 1 Utah Law Rev. 214, 224 (1976) ("The most significant aspect of the migrant labor camp is its function as a residence for migrant workers . . . . [A] migrant camp owner, who can cut off all channels of communication by closing the camp gates, and by so doing restrict the access of camp residents to information, has vested himself with power of such significance as to justify a finding that he has assumed the cloak of government.") [hereinafter cited as "Utah Comment"].

[45] *See generally* President's Commission on Mental Health, *Report of the Task Panel on Mental Health and American Families: Sub-Task Panel on General Issues and Adult Years* 1197 (February 15, 1978). This Presidential study on the mental health of farmworkers concluded that "an agricultural system which permits, [and] even unintentionally encourages, the separation of the farmworkers from the life of the community is a system which causes more misery than can be justified under any circumstances."

> able to assert his legal rights. He is trapped in a situation that is exploited by the grower, and the resulting way of life is marked by extreme fear, and psychological disorientation. Obviously, a serious attempt to break this cycle must begin by securing the right of outsiders to meet the migrant in his own world."

Thus, for example, farm workers are themselves essentially immobile. The economic system under which they operate does not function through individual contracting between worker and employer. Rather, a class of crewleaders supplies and transports the laborers.

These crewleaders exert overwhelming control over the daily lives of the workers. They own the vehicles by which the workers enjoy their only source of transportation. Access to the outside world thereby hinges upon the will and the desire of each worker's crewleader.[46]

In addition, migrants are culturally and financially unable to avail themselves of the principal modes of mass communication resorted to by the mainstream society. Conditions of employment leave them "undereducated, ill-fed, poorly housed and lacking even the most rudimentary health and sanitary facilities."[47] Most migrants do not possess a telephone, and access to a radio or television is unusual. Since the majority of workers are Spanish-speaking and illiterate, community newspapers serve no informational function. *See generally* Note, *First Amendment and the Problem of Access to Migrant Labor Camps after Lloyd v. Tanner,* 61 Cornell L. Rev. 560, 585 (1976) [hereinafter, "Cornell Note"].

The camp owner not only helps create the above conditions, but also typically exploits them. His power is essentially unbounded. Even before the AERA, for example, the Arizona

[46] See Farm Labor Contractor Registration Act of 1974, Senate Report No. 92-1395, 93rd Cong., 2nd Sess. 1-2, 1974 U.S. Code Cong. and Ad. News 6441-6442.

[47] *Ibid.*

owner's determination as to who could enter his property was absolute except in rare cases of court challenges. As stated by the Subcommittee on Migrant Labor of the Senate Committee on Labor & Public Welfare, 91st Cong., 1st Sess., in its Report, *The Migratory Farm Problem in the United States* (S.Rep. No. 91-83) (1969):

> "To the average person it is inconceivable that his landlord should have the right to determine who shall, and who shall not, be able to visit his home. But in the name of property rights, some owners of migrant labor camps presume to bar all outsiders who they . . . determine should not be allowed to see residents of the camp. In this way, they keep out not just peddlers, but union organizers . . . lawyers, and so-called do-gooders who they think might interfere with the docility of their captive work force. . . . Essentially, the camps are *company towns,* and as such, must be opened to the public." *Id.,* at 49. (Emphasis supplied.)

See also Utah Comment, *supra,* at 224; *Folgueras, supra,* 331 F.Supp., at 621.

At the same time, the owner can and does commonly furnish a level of services that is significantly beneath that provided by the Gulf Shipbuilding Corporation in *Marsh. See* Utah Comment, *supra,* at 225 ("The living conditions in migrant labor camps have been documented as among the worst in the United States."); Cornell Note, *supra,* at 567-577.[48]

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[48]In Michigan, for instance, investigators found that 45% of the camps surveyed had defective drainage; 35% had either insufficient or unsafe water supplies; 46% of the houses in the camps had no place to hang clothing; 32% of the homes had no bathing facilities; 62% of the camps had unsanitary toilets; and 70% of the units in the camp were overcrowded. In 39% of the camp units children slept in the same room with their parents. This latter figure was a bright spot—in four states, Wisconsin, Iowa, Minnesota and Washington, 74% of the camps had children and parents sleeping in the same room. See 8-C *Migrant and Seasonal Farmworker Powerlessness: Hearings Before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare,* 91st Cong. 1st and 2d Sess. 5690 (July 21, 1970) (reprinting *Preliminary Report on House of Representatives,* Report No. 3113, *Interstate Migration,* 76th Cong., 3d Sess. (January 2, 1941)).

The farm workers' segregation from the society is thus nearly total. To earn a wage, he must live on a labor camp. There, he exists at the beckon of his employer. Physically and culturally removed from the greater community, the worker depends upon the grower for satisfaction of those needs which the grower chooses to meet. In all meaningful aspects then, the farm worker, like the Chickasaw resident, is governed by a private interest upon whose beneficence he is wholly dependent for the realization of his most fundamental rights.

VI. CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be affirmed.

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APPENDIX

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ORGANIZATION AND COLLECTIVE BARGAINING OFFER THE BEST HOPE OF IMPROVING THE ABYSMAL LIVING AND WORKING CONDITIONS OF AGRICULTURAL WORKERS

I. INTRODUCTION

The progress of workers in this country has traditionally been the result of the collective bargaining process between management and organized labor. The working conditions and human needs of workers are discussed and resolved through arms-length negotiations based on the parties' relative bargaining strength. Government has correctly viewed its role in this process as restricted to the maintenance of a viable and fair atmosphere in which bargaining may occur. Accordingly, the government has interceded to guaranty fair employment practices, decent wages, safe and suitable working conditions and proper health and welfare programs only when the bargaining system fails to function properly.

Historically, this traditional method for economic and social betterment has been unavailable to farmworkers. Agricultural workers have been excluded from legislation designed to safeguard employees' organizational rights and in some instances, exemplified by Arizona's Agricultural Employment Relations Act (AERA), have been the principal targets of anti-union legislation. Farmworkers have thereby been denied the opportunity provided industrial workers of organizing and resolving their problems through arms-length negotiations.

As a result of the unavailability of collective bargaining, the federal government has been required to create and fund a variety of special programs to regulate the deplorable living and working conditions of farmworkers. Such benefit programs, however, are inherently ineffective because they fail to meet the root cause of farmworker problems, which are to be

found in the basic employment relationship. Union organization and collective bargaining could better deal with most of the evils of the present farm labor system. In fact, where legislation has not obstructed this process—for example, in California —farmworkers have been able to make significant progress.

The major responsibility for the well-being of farmworkers and their families, therefore, must shift from the government to the private parties directly involved in the underlying economic relationships. The urgency of the need for meaningful collective bargaining on behalf of agricultural workers emerges vividly from an overview of the farmworker's living and working conditions.

II. AGRICULTURAL WORKERS ARE AMONG THE MOST DEPRIVED AND POWERLESS GROUPS IN THE UNITED STATES TODAY

A. *Available Information Reveals That Farmworkers Today Work and Live Under Intolerable Conditions.*

1. The Size and Composition of the Agricultural Work Force.

Accurate data concerning the size of the farmworker labor force are virtually nonexistent.[1] The existing federal data are riddled with errors and based on widely different definitions. Two recent studies, however, which offer at least intelligent guesses on the number of farmworkers, suggest that there are approximately 5 million farmworkers and their dependents in the United States today.[2]

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[1]Truman Moore, author of one of the most comprehensive studies of the plight of the migrant worker, has noted that the United States does a better job of counting migratory birds than counting the millions of farmworkers who harvest and process our crops. T. Moore, *The Slaves We Rent* 177 (1965).

[2]D. Lillesand, L. Kravitz, & J. McClelland, *An Estimate of the Number of Migrant and Seasonal Farmworkers in the United States and Puerto Rico* (1977) [hereinafter cited as Kravitz & Lillesand Report]; Rural America, Inc., Research Report 1, *Where Have All The Farm Workers Gone? The Statistical Annihilation of Migrant and Seasonal Farm Workers by Federal Agencies* 59-81 (1977). *See also* President's Commission on Mental Health, *Report of the Task Panel on Mental Health and American Families: Sub-Task Panel On General Issues and Adult Years* 1202 (1978) [hereinafter cited as President's Commission Report].

Farmworkers are predominantly of racial or ethnic minority status.[3] Spanish-speaking persons comprise approximately 50% of the farm labor force, blacks 30%, and whites and others 20% according to recent studies.[4] Average family size for Spanish-speaking migrant farmworkers was 6.4 individuals, for black farmworkers 5.5, and for white and others 4.2.

2. Farmworker Income Figures.

(a) *National Data*

Available data reveal that the annual income averaged $2,130 for Spanish-speaking farmworker families in 1970, $1,558 for black families, and $1,808 for all other farmworker families.[5] The income figures, when combined with the data on family size, show that the individual farmworker is often struggling to support a large number of dependents on a wholly inadequate income.[6]

Most data, moreover, actually overstate farmworker income. For example, workers often incur high expenses in

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[3]President's Commission Report, at 1222.

[4]Kravitz & Lillesand Report, at 76-77, discussing results of several studies.

[5]R. Schmitt, *The Migrant Farmworker Situation in the U.S.* 14 (1975) (Library of Congress, Congressional Research Service, Report # 75-115 ED, HD 5856), referring to data from the 1970 report of the Migrant Research Project of the Office of Economic Opportunity. More recent figures are not much more encouraging. *See, e.g.*, Economics, Statistics and Cooperatives Services, United States Department of Agriculture, Agricultural Econ. Report # 405, *The Hired Farm Working Force of 1976*, at p. 6 (1978), which reports total annual income for all hired farmworkers of $2,860 in 1976, of which an average of $1,651 was earned in farm work. Average daily earnings from farm work were $19.25 with seasonal workers averaging even less. *Id.*, at 4-5.

[6]Division Migrant Programs, Office of National Programs, Manpower Administration, *Report on the Department of Labor Farmworker Task Force* 17 (1973) [hereinafter cited as Report on DOL Farmworker Task Force].

migrating, which are not reflected in income data.[7] In addition, the available figures often represent the wages not of an individual worker but rather combined efforts of an entire family including young children. Furthermore, the data reflect a wage scale bereft of any fringe benefits.[8] The net effect of these intolerably low wages is the inability of farmworkers to provide themselves and their families with even a minimally adequate standard of living.

(b) *Data for Arizona Workers*

As low as are the wages for farm work on a national basis, the available information on Arizona's farmworkers reveals that their earnings are even more limited. Professors Cohen and Rose of Arizona State University have compiled data revealing that for every year from 1965 through 1972, the hourly wages for farmworkers in Arizona were far below the average paid in the adjacent Mountain and Pacific states and were also far below the average in the entire United States.[9]

3. **The Irregular Nature of Farm Employment.**

The low wages paid to farmworkers combine with seasonal periods of unemployment to produce annual incomes far below poverty level. Thousands of members of the workforce do farm work only for brief periods of time. They are able to work only during a single harvest or a few weeks per year. During the rest of the year, some find other temporary employment; some attend school; many others are simply unemployed.[10]

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[7]Secretariat for the Spanish Speaking, National Conference of Catholic Bishops, United States Catholic Conference, *The Migrant Farmworker* § 2.9, at 2-8 to 2-11 (1976) [hereinafter cited as U.S. Catholic Conference, *The Migrant Farmworker*].

[8]*Id.* § 2.4, at 2-3.

[9]Rose & Cohen, *State Regulation of Agricultural Labor Relations—The Arizona Farm Labor Law—An Interpretive and Comparative Analysis,* 1973 Law & Soc. Order 313, 317-21.

[10]*The Hired Farm Working Force of 1976, supra* note 5, at 4-7. *See also* J.H. Burton, *The Unionization of Farm Workers* 3-4 (1977) (Library of Congress, Congressional Research Service, Report # 77-88E).

Because of the seasonal nature of farm work, a farmworker who must plan on making a large percentage of his annual income during a short season can be financially devastated by drought, crop disease and insects, equipment failure, poor market conditions or an oversupply of labor. In fact, the view has been expressed that the seasonal nature of their work is the most significant problem faced by the farmworkers:

> "Perhaps the most serious disability suffered by the migrant is his irregular, discontinuous, and uncertain employment."[11]

The seasonal nature of farm work in any specific area, coupled with the fluctuating availability of jobs even during the season, force many farmworkers to migrate, intrastate or interstate, in search of employment.[12] The consequences of frequent migration constitute the most disruptive aspect of farm work, affecting all areas of the lives of farmworkers and their families:

> "They move from one community to another, a part of none, forever outsiders, isolated from the life of the community, living outside its boundaries in filthy labor camps, always moving as the crops ripen and the next harvest beckons. Nor are they able to establish a community within the migrant stream: each season they may travel with different companions, dependent upon the vagaries of weather, crop failures, equipment breakdowns

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[11]8-C *Migrant and Seasonal Farmworker Powerlessness: Hearings Before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare,* 91st Cong., 1st and 2nd Sess. 6040 (July 14, 1970) (reprinting *Preliminary Report on House of Representatives,* Report No. 3113, *Interstate Migration,* 76th Cong., 3d Sess. (January 2, 1941)). [Further citations to these hearings will be by part number and the short title Farmworker Powerlessness Hearings. These comprehensive hearing reports give excellent insight into the range of problems faced by farmworkers and some of their causes.] *See also* President's Commission Report, *supra* note 2, 1214; 3B Farmworker Powerlessness Hearings, at 985 (United States Commission on Civil Rights, Staff Report on Farm Workers).

[12]President's Commission Report, *supra* note 2, at 1204-1206.

and other factors over which they have no control. Often their families move with them, the children attending one school after another, or working the fields to help the family earn enough money to survive. Schooling at best, is a stop-and-start sporadic process—one from which many drop out, discouraged by what they perceive as *their* failure, thus decreasing their chances to alter their lives substantially. Their sense of self-worth and self-esteem suffers as a direct result; many come to feel that they are dispensable and of little value."[13]

4. **Farmworker Housing Conditions.**

The wretched housing conditions of farmworkers have been recognized repeatedly. The dependency of the workers on growers to provide housing to them and their families allows inhumane conditions to continue uncorrected, despite publicity and in defiance of federal laws.[14]

5. **Health and Safety Problems.**

Grueling work, poor housing and sanitation, inadequate medical services, child labor and, most important, low wages all

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[13]*Id.*, at 1197. *See also* Compliance and Enforcement Division Office of Equal Opportunity, United States Department of Agriculture, *On the Migrant Farmworker . . . America's Forgotten Farmer* (March 1976) [hereinafter cited as USDA, *On the Migrant Farmworker*].

[14]*See, e.g.*, United States Commission on Civil Rights, Staff Report of Rocky Mountain Regional Office, *People Who Follow the Crops* (1978); U.S. Catholic Conference, *The Migrant Farmworker, supra* note 7, § 2.7 at 2-6 to 2-8; Report on DOL Farmworker Task Force, *supra* note 6, at 15-16; President's Commission Report, *supra* note 2, at 1283-1286.

The persistence of the problem is apparent from a 1970 statement describing appalling conditions that are largely unchanged today:

> "We saw housing and living conditions horrible and dehumanizing to the point of disbelief . . . without heat, adequate light or ventilation, and containing no plumbing or refrigeration. Each room (no larger than 8x14 feet) is the living space for an entire family, approximately suggesting slave quarters of earlier days. . . ."

Farmworker Powerlessness Hearings, at 4982 (July 20, 1970) (Statement of Dr. R.M. Wheeler). *See also* 3B Farmworker Powerlessness Hearings, at 994 (U.S. Commission on Civil Rights Staff Report on Farmworkers).

contribute to the health problems of migrants. The migrant has an average life expectancy significantly shorter than the average national life span.[15]

The infant and maternal mortality rate for farmworkers is two and a half times that of the national average; they have higher mortality rates for infections and other preventable diseases such as tuberculosis, influenza, pneumonia and respiratory disorders.[16] Malnutrition and severe vitamin deficiency also contribute to the deplorable health conditions of farmworkers.[17]

Farm work is also extremely hazardous, representing the third highest death and serious injury rate of all occupations.[18] The disability rate for migratory or seasonal farmworkers and members of their families is three times that of the general U.S. population.[19]

One of the most significant health and safety hazards related to farm work is the use of pesticides.

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[15]B. Thedinger, *Research Into the Current Plight of Farmworkers in the United States* 31 (1976) (paper of the Catholic Diocese of Kansas City—St. Joseph, Mo., distributed by National Institute of Education, United States Department of Health, Education and Welfare as ERIC Report # RC-009-110/ED-121-513).

[16]Report on DOL Farmworker Task Force, *supra* note 6, at 16-17. *See also* U.S. Civil Rights Commission, *People Who Follow the Crops, supra* note 14. Dr. Raymond M. Wheeler has also observed instances of rickets and leprosy and widespread occurrences of urinary infections, intestinal parasites and ear disease. Farmworker Powerlessness Hearings, at 4980-4992 (statement of Dr. R.M. Wheeler).

[17]I.E. Harrison, Pennsylvania Department of Health, Behavioral Science Working Paper 72-3, *Migrant Papers* 58-59 (1972).

[18]U.S. Commission on Civil Rights, *People Who Follow The Crops, supra,* citing National Safety Council, *Accident Facts* (1971). 3B Farmworker Powerlessness Hearings, at 994 (U.S. Commission on Civil Rights, Staff Report on Farm Workers).

[19]B. Thedinger, *supra* note 15, at 31. *See generally, id.* at 31-35. *See also* Occupational Safety and Health Reporter (BNA) 1145-1149 (November 30, 1978), for the most recent results of Bureau of Labor Statistics Surveys, which rank agriculture as having the highest occupational injury and illness incidence rate.

> "The pesticide problem would appear to be the literal apotheosis of the migrant farm workers' dilemma. These people are prey to the most unspeakable of occupational health hazards—death through nerve gas asphyxiation, and yet they are unprotected by safety legislation in all states save California . . . . Employers won't even recognize their right to safe and healthful workplaces—a right purportedly guaranteed by every state industrial accident commission in this country to every workingman and woman, as a 'bargaining' point. Then what we have is a class of workers who rival the 'helots' of ancient Sparta who were slaughtered at the whim and discretion of the warring Spartan landowners."[20]

Information establishing the extent of farmworker exposure to pesticides is woefully lacking. The Food and Drug Administration has estimated that some 800 to 1,000 fieldworkers are killed and 80,000 to 90,000 are injured by pesticides annually.[21]

The total impact of these assaults on farmworker health spreads into all areas of farmworkers' lives. Their ability to

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[20]6A Farmworker Powerlessness Hearings 3196 (August 1, 1969) (Statement of Jerome B. Gordon). The entire Parts 6-A and 6-C of the Farmworker Powerlessness Hearings are devoted to the deleterious effects of pesticide exposure on farmworker health.

[21]B. Thedinger, *supra* note 15, at 37. Less well known, but equally serious, are the long-term consequences of exposure to low hazard pesticides. Recent research suggests severe neurologic and carcinogenic effects in pesticides that were previously considered "mild." Howitch & Moore, *International Health Effects of Pesticides,* University of California, Davis, Economic Research Service; Metcalf & Holmes, *EEG, Psychological and Neurological Alterations in Humans With Organophosphate Exposure, 160 Annals of the New York Academy of Sciences* 357-365 (1969); Van Gelder, et. al., *The Effects of Dieldrin and Ruelene Exposure on Experimental Behavior and the Electroencephalogram,* Environmental Health Sciences Series 125; Rayner, et. al., *Hyporeflexia in Workers Chronically Exposed to Organophosphate Insecticides,* 4(3) Research Communications in Chemical Pathology and Pharmacology 596 (1972); President's Commission Report, *supra* note 2, at 1245-1249.

earn a living, their children's ability to profit from education, and the ability of all members of the family to cope with their demanding life are all impaired.[22]

6. The Generational Nature of Farmworker Problems.

Farmworkers attain an educational level four years below that of most other groups in the nation,[23] with black and Spanish-speaking farmworkers suffering the largest setbacks. The school dropout rate for migrant children is similarly bleak. They have only a 40% chance of entering the 9th grade, and an 11% chance of entering the 12th grade.[24]

The National Education Association reported that a number of factors were responsible for the high dropout rate and other educational problems of migrant children:

> "(1) geographic mobility; (2) the use of child labor to supplement meager family earnings; (3) poor health, nutritional deficiencies, and exposure to the hazardous environmental conditions of farm work; (4) the discriminatory practices and negative attitudes of community and school personnel; (5) the inability of traditional monolingual school systems to deal with the multicultural, multilingual backgrounds of migrant children; (6) the lack of continuity in educational programs for these mobile

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[22]*See* President's Commission Report, *supra* note 2, at 1221-1239, concluding that only structural change, including protection of their right to organize, can improve farmworker mental health (at 1228) and recommending the creation of hope, power and self-esteem as remedies (at 1231).

[23]In 1973 farmworkers had a median educational level of 8.4 years while all other workers had a median education of 12.4 years. Those of Spanish origin obtained only 4.5 median years of education, compared to black farmworkers' median of 5.8 years and Anglos' 9.7 years. B. Thedinger, *supra* note 15, at 42.

[24]National Child Labor Committee, *Promises to Keep: The Continuing Crisis in the Education of the Migrant Child* (1977). The farmworker dropout figures should be compared to those of the non-farmworker, who has a 96% chance of entering 9th grade and 80% chance of entering 12th grade. *See also* USDA, *On the Migrant Farm Worker, supra* note 13, at 11 (most migrants have a 4th grade education).

children, and the inability of traditional school systems to recognize the need for interstate transfer of academic credits earned by migrant students."[25]

These educational problems of farmworkers are particularly distressing because they foretell the continuing plight of future generations of farmworkers.

B. *The Problems Of The Farmworkers Are Bound To Their Employment Relationship.*

Certainly, farmworkers are not the only disadvantaged group to face the problems of racial discrimination, poverty, poor housing, bad health, and educational deficiencies. The problems of the farmworker, however, are uniquely bound to his employment relationship. This interrelationship between the worker and the work was aptly described by the United States Department of Labor Task Force:

> "Farmworkers suffer from the same economic and social problems as other poor people but to a greater degree. Among classes of the disadvantaged designated for special Federal attention, only farmworkers are an occupational group. Their plight is unique because it is their working conditions (the seasonal and sometimes mobile nature of their jobs, the exclusion from the protections of job-related social legislation, the long hours and low pay, and the other egregious realities of agricultural hand labor) which give rise to most of the other problems endemic to farmworkers such as child labor, short life expectancy, poor nutrition, job insecurity, incidence of disease, inadequate housing, and powerlessness."[26]

The situation of Arizona's farmworkers mirrors, and in some respects exceeds, this bleak national picture with respect

[25]President's Commission Report, *supra* note 2, (reporting presentation to sub-panel by Roy Fuentes, Manager, National Education Association Migrant Project, June 1977).

[26]Report on DOL Farmworker Task Force, *supra* note 6, at 98.

to income, housing, health and educational problems.[27] The dilemma confronting Arizona farmworkers, as is true for many of this nation's other agricultural workers, is that without any power over their working conditions, they cannot substantially improve their lot in life no matter how hard they work.

C. *Federal Benefit Programs Cannot Adequately Resolve The Problems Confronting The Nation's Farmworkers.*

Until recently, most of this country's social and labor legislation has excluded farmworkers, thereby contributing to the existence of substantial poverty and inadequate living conditions.[28] Farmworkers, unlike any other group, have been either totally excluded from or denied the full benefits of such laws as the Fair Labor Standards Act,[29] workmen's com-

[27]Cohen & Rose, *State Regulation of Agricultural Labor Relations—The Arizona Farm Labor Law—An Interpretive and Comparative Analysis, supra* note 9, at pp. 315-321 (providing a detailed survey of Arizona's farm labor force, including seasonal and migratory employment and average wages). *See also* Economics, Statistics and Cooperatives Service, United States Dept. of Agriculture, *Farm Labor* (Washington, Nov. 1978) (containing more recent data concerning Arizona farm labor force).

[28]Moberly, *Collective Bargaining Laws and Agricultural Employers: Some Necessary Changes,* 2 L. Forum 469 (1976). *See also* C. McWilliams, *Factories in the Field* (1939); E. Nelson, *Huelga* (1961); Chase, *The Migrant Farmworker in Colorado—The Life and the Law,* 40 Colo.L.Rev. 45 (1967); Note, *Migrant Farm Labor in Upstate New York,* 4. Colum. J. Law Soc. Probs. 1 (1968).

[29]Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1978), as amended Pub. L. No. 89-601, 80 Stat. 830 (1966), Pub. L. No. 93-259, 88 Stat. 55 (1974), and Pub. L. No. 95-151, 91 Stat. 1245 (1977) [hereinafter FLSA]. Originally, farmworkers were not covered by the FLSA at all. In 1966 wage guarantees were extended to farmworkers for the first time. The rate was lower than for non-farmworkers and applied only to farmworkers working for large farms (an employer who used more than 500 mandays of agricultural labor in any calendar quarter of the preceding calendar year). In 1974 amendments provided for a gradual phasing-in of a farm wage rate that would become equal to the non-farm rate. Parity has been achieved as of January 1, 1978 with a wage rate of $2.65 per hour.

Farmworkers have never been protected by FLSA's overtime provisions. See 29 U.S.C. §§ 207, 213(a)(12).

pensation,[30] unemployment compensation[31] and Social Security.[32] Finally, farmworkers are totally excluded from the national labor laws, which guarantee other workers the right to organize and bargain collectively and which govern other labor-management activities.[33]

While farmworkers have been excluded from the benefits of most labor laws, Congress has passed some protective legislation in an attempt to ameliorate the desperate plight of farmworkers. Significant examples of such legislation include the Migrant Health Act,[34] the Occupational Safety and Health Act,[35] certain amendments to the Fair Labor Standards Act,

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[30]See Bull, *Application of Christian Principles for the Promotion of the Rights of Migrant Workers and Refugees in the Field of Labor Rights in the U.S.A.*, 20 Catholic Lawyer 233, 251 (1974), discussing state exclusions of farmworkers from workmen's compensation laws.

[31]See Note, *The Farmworker: His Need for Legislation*, 22 Maine L. Rev. 213, 234 (1970).

[32]*Id.*, at 229. *See generally* President's Commission Report, *supra* note 2, at 1215-1216.

[33]The exclusion of agricultural workers is found at § 2(3) of National Labor Relations Act, as amended, 29 U.S.C. § 152(3).

[34]Migrant Health Act, as amended, 42 U.S.C. § 247d.

[35]Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1973) [hereinafter OSHA]. OSHA requires that each covered employer:

> "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

Pursuant to the OSHA, the Secretary of Labor is empowered to set standards for safe and healthy working conditions in all industries affecting interstate commerce, including agriculture. However, despite this broad statutory authority, the only health and safety standards promulgated to protect farmworkers generally are Temporary Labor Camps, 29 C.F.R. 1910.142; Roll-over Protective Structures for Agricultural Tractors, 40 Fed. Reg. 18,254 (April 25, 1975); and Guarding of Farm Field Equipment, Farmstead Equipment and Cotton Gins, 41 Fed. Reg. 10,190 (May 9, 1976). The Secretary of Labor has refused to extend basic sanitation protections to farmworkers, even in the face of litigation. *See National Congress of Hispanic American Citizens v. Usery*, 544 F.2d 1196 (D.C. Cir. 1977) (the Secretary may depart from statutory timetable in promulgating agricultural standards in good faith effort to allocate available resources). No other agricultural standards will be issued in the foreseeable future. *See* Secretary's Timetable

which now includes farmworkers within its minimum wage guarantees and its protections against the use of child labor[36] and the Farm Labor Contractor Registration Act.[37] Unfortunately, despite the expenditure of several billion dollars of federal monies over the past 15 years, these legislative efforts have proved largely ineffective in improving or changing the conditions of farmworkers.[38]

Following a review of the various federal programs affecting farmworkers and their dependents, the President's Commission on Mental Health concluded that the programs were a complete failure:

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for Development of Agricultural Occupational Safety and Health Standards for Field Sanitation, Noise, Nuisance Dust and Personal Protective Equipment, *National Congress of Hispanic American Citizens v. Usery*, No. 2142-73 (D.D.C., timetable filed September 22, 1978) (on remand).

[36]*See* note 29, *supra*.

[37]Farm Labor Contractor Registration Act of 1963, 7 U.S.C. §§ 2041-2055 (Supp. V 1978) [hereinafter FLCRA]. FLCRA was originally enacted to curb the abuse of farmworkers by farm labor contractors, who frequently misrepresented working conditions, made excessive deductions from farmworkers' wages and furnished substandard housing. Unfortunately, congressional hearings revealed that enforcement of the Act by the Department of Labor between 1963 and 1973 was virtually non-existent.

> "The Act has failed to achieve its original objectives. It has become clear that the provisions of the Act cannot be effectively enforced. Noncompliance by those whose activities the Act were [sic] intended to regulate has become the rule rather than the exception."

S. Rep. No. 93-1295, 93d Cong. & Ad. News 6441, 6443.

This record of nonenforcement led to enactment of the 1974 amendments, which provided a wider range of sanctions to the Department of Labor, required the Department of Labor to investigate and monitor crewleader activities and created a private cause of action on behalf of the aggrieved workers. Even this enhancement of workers' remedies, however, has not led to more effective enforcement. National Association of Farmworker Organizations, *An Analysis of the Department of Labor's Services for Farmworkers* 64-82 (May 1978) (paper prepared under DOL Contract No. 99-77-1089-36-45); *Alexander v. Brennan*, No. 74-76 (D.D.C., June 18, 1976).

[38]President's Commission Report, *supra* note 2, at 1196; NAFO Report, *supra* note 37.

"[B]y any outcome criteria the programs must be counted as having failed to effect substantial improvements in the lives of farmworkers, whose general condition has not significantly improved during this time span. Laws, however noble in intent, are not enforced. Access to generic programs for the poor may have been improved, yet farmworkers still do not participate in these programs in proportion to their needs. Categorical programs overlap, duplicate services, and fail to address the needs of the total farmworker family in any comprehensive manner."[39]

Of the ineffectiveness of the federal effort under the Migrant Health Act, the Department of Labor Farmworker Task Force stated:

"Because of limited funding and increasing medical costs, the Migrant Health Act which attempts to provide services to farmworkers is only serving about 3% of the nation's farmworkers. Services provided under this program are short-range and do not cover long-range medical needs."[40]

The federal government's efforts to provide every employee with a safe and healthful working environment as applied to farmworkers have also failed to effect the necessary change in conditions:

"There is consensus among farmworker advocates that OSHA standards, as well as other standards regarding farmworker housing, pesticide use, occupational safety, and health are largely inadequate, ignored, or unenforced."[41]

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[39]President's Commission Report, *supra* note 2, at 1288. *See also* Report on DOL Farmworker Task Force, *supra* note 6, at 98.

[40]Subcommittee on Migratory Labor, Senate Committee on Labor and Public Welfare, *Migratory Farm Labor Problem in the United States*, S. Rep. No. 91-93, 90th Cong., 1st Sess. 27 (1969), cited in Report on DOL Farmworker Task Force, *supra* note 6, at 17.

[41]President's Commission Report, *supra* note 2, at 1244; *see* NAFO Report, *supra* note 37, at 13-58. *See also* note 35, *supra*.

Sixty-five percent (65%) of the nation's farmworkers are still excluded from even minimum wage coverage under FLSA.[42] Despite the 1974 Amendments, attempts to halt exploitation of farmworkers by crewleaders under FCLRA have "failed tragically," and farmworkers are thereby prevented "from controlling the most basic elements of their existence."[43]

These failures of federal benefit programs are endemic to a farm labor system that keeps farmworkers powerless to alter their own living and working conditions.[44] Farmworkers are the only *occupational* group in this country that have had to be the intended beneficiaries of such a substantial expenditure of the taxpayers' money. They are the true working poor, whose hard labor still cannot provide for their families' basic needs:

"The burden of providing the human services which the farmworker and his family so desperately need falls not upon the employer of the farm laborer but upon the taxpayer, who must assume the cost of providing these services. In no other industry have the economic risks been shifted so directly from management to the public, which must compensate, through the provision of human services, for the abuses which the farmworker endures as a result of the agricultural industry's failure to attend to the needs of its own work force."[45]

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[42]President's Commission Report, *supra* note 2, at 1242; NAFO Report, *supra* note 37, at vii-viii, 84-97. *See also* note 29, *supra*.

[43]President's Commission Report, *supra* note 2, at 1218, 1244-1245; *see* NAFO Report, *supra* note 37, at vii-viii, 63-82. *See also* note 37, *supra*, for history of FLCRA.

[44]The President's Commission on Mental Health, Task Panel on Migrant and Seasonal Farmworkers, has pointed out that legislative exclusions, poor enforcement and lack of coordination do not tell the whole story:

"However, the temptation to view these efforts simply as failures of coordination must be avoided. The panel believes that the failures of federal programs are the outcome of an agricultural system that continues to isolate farmworkers, keeps them locked in a continuing cycle of poverty, and prevents their full participation in our national life."

President's Commission Report, *supra* note 2, at 1288.

[45]*Id.*, at 1197.

The primary responsibility for the well-being of farmworkers and their families must shift from the government to the private agricultural industry.[46] The only viable mechanism for the effective resolution of the problems of farmworkers may well be the collective bargaining process. This conclusion has been widely endorsed by those who have studied the conditions of farmworkers and the needs of the agri-business community.[47]

Indeed, this Court, in protecting the rights of farmworkers to organize and engage in concerted activity free of intimidation by Texas state authorities, recognized the deplorable conditions suffered by farmworkers and the vitality of the organizational process in dealing with those problems:

> "The appellees [U.F.W.O.C.] sought to do no more than organize a lawful union to better the situation of one of the most economically oppressed classes of workers in the country." *Allee v. Medrano,* 416 U.S. 802, 814 (1974).

Similarly, the President's Commission on Migratory Labor concluded more than twenty-five years ago that self-organization offers farmworkers the best method for improving their working conditions:

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[46]Nor can the existing private enforcement remedies provide sufficient relief. Access to legal services is limited. Litigation is impeded by the mobility of the workers, by lack of resources and by the farmworkers' ignorance of his few legal rights. *See* U.S. Commission on Civil Rights, *People Who Follow The Crops, supra* note 14.

[47]*See, e.g.,* R. Schmitt, *supra* note 5, at 23; Report on DOL Farmworker Task Force, *supra* note 6, at 93-94 ("In our political/economic system, workers' wages and working conditions are most likely to be improved through collective bargaining."); President's Commission Report, *supra* note 2, at 1249; D. Nelkon, *On the Season: Aspects of the Migrant Labor System* 77 (1970) (New York State School of Industrial and Labor Relations, Cornell Univ); 3B Farmworker Powerlessness Hearings 1005 (July 16 and 17, 1969) (U.S. Commission on Civil Rights, Staff Report on Farm Workers); G. Baker, *The Invisible Workers: Labor Organizations on American Farms* in *Radical Agriculture* 143-167 (B Merrill ed. 1976).

> "The Commission is convinced that balanced organization and effective collective bargaining would be of great assistance not only to farmworkers, who would thereby be given a voice in determining wages and conditions of employment, but it would contribute also to more orderly management of labor. In the long run, self-organization is the method by which agricultural workers can best improve their working condition."[48]

The validity of these conclusions become strikingly clear when the effectiveness of the collective bargaining process is compared with the futile federal efforts to improve farmworkers' lives.

III. THE PROBLEMS OF FARMWORKERS CAN BEST BE MET THROUGH ORGANIZATION AND COLLECTIVE BARGAINING

The majority of pressing problems surveyed above are amenable to resolution through the collective bargaining process. Such issues are, in fact, the essential subjects of union-management negotiations elsewhere. This self-help approach is vastly preferable to wasteful and scattered government intervention.

Instead of attempting to address the health needs of farmworkers through the Migrant Health Act, the workers could resolve their own health problems by developing health insurance and pension plans, obtaining paid sick leave and negotiating to improve farm safety.[49] Rather than rely on the minimum wage protections of the Fair Labor Standards Act, the workers could negotiate for higher wages and maximum

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[48]8C Farmworker Powerlessness Hearings 6180 (July 24, 1970) (The President's Commission on Migratory Labor, *Migratory Labor in American Agriculture,* March 26, 1951).

[49]3B Farmworker Powerlessness Hearings 1007 (July 16 and 17, 1969) (U.S. Commission on Civil Rights, Staff Report on Farm Workers).

hour protection.[50] Farmworkers could totally eliminate the recognized evils of the farm labor contractor system through the signing of union contracts and the use of union hiring halls rather than rely upon the protective paternalism of the Department of Labor.[51]

The effectiveness of collective bargaining as a means of resolving farmworkers' problems is evidenced by the improved condition of California farmworkers since unionization has become possible there:

> "The UFW has made gains for California's farmworkers. Over the past decade, the prevailing wage for field labor has risen from just over a dollar an hour to better than $2.25 in 1974. This compares well with the federal minimum wage for agriculture ($1.60 in 1974), and the UFW can take credit for exerting the pressure that has driven wages up. Union workers, of course, are better paid than the average; the Almaden vineyards, which are under UFW contract, pay their field workers $2.75 an hour (in 1974) and their tractor drivers $3.80.
>
> "Union contracts specify what pesticides may be used and how much time must pass after the fields are sprayed before workers can return. The United Farm Workers has a death benefit plan for its members and, in some areas, provides a credit union and medical services. But the most important change brought by the UFW on the ranches where it has won contracts is the elimination of the labor contractor system."[52]

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[50] *Id.*, at 1007; 8C Farmworker Powerlessness Hearings 6179 (July 24, 1970) (The President's Commission on Migratory Labor, *Migratory Labor in American Agriculture,* March 26, 1951).

[51] 8C Farmworker Powerlessness Hearings, *supra* note 49, at 6180.

[52] Dunbar & Kravitz, *Hard Travelling* 45 (1976). *See* B. Thedinger, *supra* note 15, at 49 ("In California, in the given years following the grape boycott, wages and fringe benefits nearly doubled and important gains in field conditions were won by the United Farm Workers."). *See also* U.S. Catholic Conference, *The Migrant Farmworker, supra* note 7, at 5-6; J.H. Burton, *supra* note 10, at 25-30.

Of course, the rights of California farmworkers to organize and bargain collectively are secured to them by the California Agricultural Labor Relations Act [hereinafter cited as CALRA],[53] which was intended to enable farmworkers to utilize the collective bargaining system in a fair and effective manner.[54]

Unlike the CALRA, the Arizona Agricultural Employment Relations Act can only be depicted as an anti-labor law.[55] The impossible procedures provided by the AERA and the lack of worker confidence in its organizing and election provisions are revealed by the fact that since its passage in May 1972, only nine petitions for elections have been filed. Of these, four were withdrawn prior to any elections being held; only three elections have actually been held.[56] The experience under the CALRA is, by contrast, quite illuminating:

> "By January 1976, after five months of operation, the board had received 604 election petitions and had conducted 423 elections involving approximately 50,000 farmworkers."[57]

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[53] California Labor Code §§ 1140 *et seq.* (West Supp. 1976).

[54] *See generally* Rochin, *New Perspectives on Agricultural Labor Relations in California,* 28 Labor L.J. 395-402 (1977); J.H. Burton, *supra* note 10; Levy, *Agricultural Labor Relations Act of 1975—La Esperanza de California Para el Futuro,* 15 Santa Clara Lawyer 783 (1975).

[55] *See generally* Cohen & Rose, *State Regulation of Agricultural Labor Relations—The Arizona Farm Labor Law—An Interpretive and Comparative Analysis,* 1973 L. & Soc. Ord. 313-72; Rose, *State Regulation of Agricultural Labor Relations—The Arizona Farm Labor Law—A Constitutional Analysis,* 1973 L. & Soc. Ord. 373-431; Moberly, *Collective Bargaining Laws and Agricultural Employees: Some Necessary Changes,* 1976 L. Forum 469-508. *See also* Appendix, at 79-92 (stipulated Statement of Status of Past and Pending Actions taken in Accordance With the Agricultural Employment Relations Act, filed January 21, 1977).

[56] Stipulated Statement of Status of Past and Pending Actions Taken in Accordance With the Agricultural Employment Relation Act, filed January 21, 1977, and Stipulation Regarding Harvest and Pre-Harvest Seasons, Cactus Ranch Data, *United Farm Workers Nat'l Union v. Babbitt,* 449 F. Supp. 449 (D. Ariz. 1978), *reprinted in* Appendix at 79, 192.

[57] Agricultural Labor Relations Board, *First Annual Report for the Fiscal Years Ended June 30, 1976 and June 30, 1977,* at page 10 (January 24, 1978).

IV. CONCLUSION

The desperate plight of the farmworker, the ineffective and wasteful efforts of the federal government, and the hope and promise of collective bargaining were best summarized by then-Senator Walter Mondale during the hearings before the Subcommittee on Migratory Labor:

> "I have a lot less hope that the bureaucracy is going to be truly meaningful and relevant in their effort to respond to migrants than do many people who have studied this problem. I think the migrants have suffered from an overdose of malignant paternalism. It is a wonderful way for white people to work out their guilt feelings. Eleanor Roosevelt visited them, and we had films and documentaries such as 'Harvest of Shame.' Two years ago we had the educational television people do a follow-up to 'Harvest of Shame.' Now, thank goodness, NBC is going to go back again.
>
> "We are going to have another 'Harvest of Shame' revisited, and we are just having a wonderful time studying and restudying the migrants. The single most significant aspect of the studies is that the situation is continuing to grow worse in its tragedy. The whole migrant stream continues to be refueled daily along the Mexican border, California and Texas, and this has national ramifications.
>
> "After these many years we have a sort of ritual where we come up with new plans, new ideas, and new suggestions, but all of them have the same paternal base. Every program is phrased in terms of: 'This is something we are going to do for them.'
>
> "I wonder whether much more time and much more hope might be found in structuring programs that permit the migrants to do something for themselves. For example, the right to organize and bargain collectively, the right to strike . . . .

> "If we just did that, I think the economic position of the average farmworker and migrant would be demonstrably improved."[58]

This Court, of course, cannot judicially legislate for farmworkers those labor rights that have been enjoyed by all other working people in our nation for the last half century. However, an anti-labor law, as riddled with obstacles to workers' constitutionally-protected activities as is the Arizona Agricultural Employment Relations Act, is a shameful affront to accepted public policy. As demonstrated in the body of this brief and in the opinion of the three-judge court, it is also an unconstitutional infringement on the fundamental rights of Arizona's farmworkers and therefore cannot be judicially tolerated.

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[58] 7B Farmworker Powerlessness Hearings, at 4561 (Statement of then-Senator W. Mondale).

DIVISION, BOARD OF GLOBAL MINISTRIES, UNITED METHODIST CHURCH; NATIONAL FARM WORKER MINISTRY; NATIONAL FEDERATION OF PRIESTS' COUNCILS; NATIONAL ASSEMBLY OF WOMEN RELIGIOUS; NETWORK, A CATHOLIC LOBBY FOR SOCIAL JUSTICE LEGISLATION; NEW YORK STATE COUNCIL OF CHURCHES; OUR LADY OF VICTORY MISSIONARY SISTERS; P.A.D.R.E.S. (PADRES ASOCIADOS PARA DERECHOS RELIGIOSOS EDUCATIVOS SOCIALES); RELIGIOUS OF THE INCARNATE WORD; RELIGIOUS OF THE SACRED HEART, CALIFORNIA PROVINCE; SISTERS OF LORETTO; SISTERS OF THE PRESENTATION, SOCIAL JUSTICE COMMITTEE; SISTERS OF THE COMPANY OF MARY; SISTERS OF NOTRE DAME DE NAMUR, MARYLAND PROVINCE; SOCIAL ACTION COMMITTEE OF THE PAULIST FATHERS; TUCSON ECUMENICAL COUNCIL; UNITED CHURCH BOARD FOR HOMELAND MINISTRIES; UNITARIAN-UNIVERSALIST ASSOCIATION; UNITED PRESBYTERIAN CHURCH IN THE USA; AND WISCONSIN MIGRANT MISSION;

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Supreme Court of the United States

OCTOBER TERM, 1978

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Appellants,

v.

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court, pursuant to Rule 42(1) of the Rules of this Court, for leave to file the accompanying brief as *amicus curiae* in support of the position of the appellees in this case.

INTEREST OF THE AFL-CIO AND ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of national and international labor organizations, including appellee, United Farm Workers of America, representing approximately 13,500,000 employees throughout the United States.

Most employees in the United States work for employers who are covered by labor relations statutes which, whatever we may consider to be their imperfections, at least recognize the principle of free collective bargaining. In grim contrast, the agricultural workers of the State of Arizona, some of whom, with their union, are plaintiff-appellees in this case, are subject to a statute which gives only lip service to that principle, hedging about its exercise with onerous and lengthy delays, and in almost every conceivable detail placing the authority of the state on the side of the employers who are anti-union.

The issues unique to this legislative throwback to an era which we had thought long past are discussed in the brief of the appellees who bring to that discussion immediate experience we do not share. But there is at least one constitutional issue in this case which has potential significance beyond the context of the Arizona statute involved herein, and as to which we believe we can provide some additional insight. We refer, and devote the brief we tender, to § 1385 (B)(8) which contains a sweeping prohibition against publicity which induces or encourages consumers not to purchase particular produce. Our brief discusses the constitu-

tionality of that provision in light of the principles declared in this Court's most recent decisions elaborating upon the meaning of the First Amendment.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in the case is set forth in that motion.

ARGUMENT

So long as members of the general public enjoy the freedom to buy what they want, where they want, public discussion criticizing a seller's business methods and urging consumers on the basis of that criticism not to buy enjoys the full measure of First Amendment protection, as we now show.

A. Two of the First Amendment decisions rendered this past term reaffirm the basic free speech tenets applicable

here. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, is the first of these:

> The speech proposed by appellants is at the heart of the First Amendment's protection.
>
> > "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940).
>
> The referendum issue that appellants wish to address falls squarely within this description. In appellants' view, the enactment of a graduated personal income tax, as proposed to be authorized by constitutional amendment, would have a seriously adverse effect on the economy of the State. See n. 4, *supra*. The importance of the referendum issue to the people and government of Massachusetts is not disputed. Its merits, however, are the subject of sharp disagreement. [435 U.S. at 776-777.]

The paragraph in *Thornhill* following the one quoted in *Bellotti* also speaks directly to the question presented here:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C. I. O.*, 307 U.S. 496; *Schneider* v. *State*, 308 U.S. 147, 155, 162-63. See *Senn* v. *Tile Layers Union*, 301 U.S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an

> importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U.S. at 478): "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." [310 U.S. at 102-103.]

In Re Primus, 436 U.S. 412, adds the following insight:

> Appellant's letter of August 30, 1973, to Mrs. Williams [communicating an offer of free assistance by attorneys associated with the ACLU] thus comes within the generous zone of First Amendment protection reserved for associational freedoms. The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. See n. 32, *infra*.; cf. *Bates* v. *State Bar of Arizona*, 433 U.S., at 364; *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 779-780 (1976) (STEWART, J., concurring). As *Button* indicates, and as appellant offered to prove

> at the disciplinary hearing, see n. 9, *supra,* the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants. " 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins,* 323 U.S. 516, 537 (1945). The First and Fourteenth Amendments require a measure of protection for "advocating lawful means of vindicating legal rights," *Button,* 371 U.S., at 437, * * *. [436 U.S. at 431-432.]

In *Thomas* v. *Collins,* the effort to "persuade to action" was a "speech [whose] whole object was publicly to proclaim the advantages of workers' organization and to persuade workmen to join Local No. 1002 as part of a campaign for members." (323 U.S. at 533.) In determining that Texas could not restrain such persuasion, the Court noted "Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection." (*Id.* at 538.)

Commercial activity generates not only a stream of goods and services but a series of significant social issues. Businessmen are both participants in the public dialogue and its subject. Their decisions—concerning such matters as collective bargaining, equal employment opportunity, the use and preservation of natural resources, the maintenance of the environment, the location of facilities in one area of the country or another or in a foreign country, the doing of business with repressive regimes, support for or opposition to government action—directly and immediately affect each of us. The precedents just reviewed make it plain that precisely because that is so, speech on these subjects, including speech designed to persuade to action, is "at the core of the First Amendment's protective ambit" (*Primus,* 436 U.S. at

424) and the "constitutionality of any prohibition * * * turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech" (*Bellotti,* 435 U.S. at 786).

B. (1) The State's justification for § 1385(B)(8) of the Arizona Act is that it is a "Prohibition Against False Secondary Consumer Pressures." (App. Br. 58, Heading.) While it is not wholly inconceivable that the Arizona Supreme Court would "mak[e] this law a nose of wax, to be changed from that which the plain language imports" (*Yu Cong Eng* v. *Trinidad,* 271 U.S. 500, 514), and while such a construction would be binding on this Court, the District Court understandably read the provision as it was written. And, so read that section is by no means limited to false secondary consumer pressures.

The first sentence prohibits all "dishonest, untruthful and deceptive publicity"—whether it be primary or secondary. The remainder of the provision, which declares what is and what is not "permissible inducement or encouragement," adopts a highly restrictive and idiosyncratic notion of what is false and of what is secondary pressure.[1]

For example, the last sentence of this section expressly excludes publicity directed against any "trade mark, trade name or generic name which may include agricultural prod-

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[1] We, of course, recognize that, as Mr. Justice Harlan wrote for the Court, "No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries." (*Railroad Trainmen* v. *Terminal Co.,* 394 U.S. 369, 386.) But by the same token, in determining whether the statute here violates the First Amendment, the Court is "compelled by neither precedent nor policy to give any more weight to the epithet ['secondary pressure'] than [it has] to other 'mere labels of state law'." (*Cf. New York Times Co.* v. *Sullivan,* 376 U.S. 254, 269 and cases cited *id.* at notes 7 through 12.)

ucts of another producer * * * "; it thus forbids all truthful publicity which is directed against such trade mark, trade name or generic name. For example, the statement "Don't Buy Arizona Oranges Because Arizona Farm Workers are Paid Lower Wages Than Organized Farm Workers in California," would be forbidden, even though entirely truthful. Likewise, the statement "Don't Buy X-Brand Cantaloupes Because 95% Of Them Are Grown Under Non-Union Conditions [or because 95% of them are picked by child labor or by illegal immigrants]" would be forbidden even though completely true. Indeed, since the second sentence defines "permissible inducement or encouragement within the meaning of the section * * * " it would appear that any adverse publicity that does not "identif[y] the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute * * *—viz., truthful publicity against non-union produce as a class—would be forbidden.

Thus, a more accurate description of § 1385(B)(8) is that it outlaws much truthful publicity and all false publicity which induces persons not to purchase an agricultural product without regard to whether the publicity is primary or secondary.

It also is clear from the foregoing that the comparison which appellants draw between § 1385(B)(8) and § 8(b)(4)(ii)(B) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 158, provides no support for the Arizona statute. For, whereas the federal law, in terms and as construed in *Labor Board* v. *Fruit Packers (Tree Fruits)*, 377 U.S. 58, and its companion case *Labor Board* v. *Servette*, 377 U.S. 46, requires a finding that a secondary person has been threatened, coerced or restrained, the Arizona statute requires no such finding; it outlaws all publicity which falls

outside its narrow definition of what is truthful, honest and non-deceptive, regardless of its effect. Moreover, in deprecating the significance of the acknowledged difference that "the Arizona provision deals with all secondary consumer pressures, whereas *Tree Fruits* dealt only with picketing" (App. Br. 59-60) appellants not only assume the answer to the constitutional question which the majority of the Court did not reach in *Tree Fruits*, they treat as irrelevant the circumstance which Justice Harlan, in disagreement with Justice Black, regarded as "the very thing that renders [§ 8(b)(4)(ii)(B)] invulnerable to constitutional attack"—that under the federal statutes "other methods of communication are left open." (377 U.S. at 93, dissenting opinion.) And even if it is accurate to say that the Arizona law permits some consumer picketing which would be outlawed under *Tree Fruits* (App. Br. 60)[2] and which is unprotected by the First Amendment, an unconstitutional ban on speech is not saved because the state has in other respects failed to exhaust the full scope of its constitutional authority.

Of course, the fact that the Arizona law is significantly more restrictive than the federal law does not render the former unconstitutional. But these differences do refute appellants' effort to convey the suggestion that invalidation of the Arizona law would also entail striking down § 8(b)(4)(ii)(B) insofar as that section applies to secondary consumer publicity. And because of these differences, this case does not require ultimate resolution of the constitutional issue left open in *Tree Fruits*.[3]

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[2] Appellants give no illustration of consumer picketing which would be permitted by § 1385(B)(8) other than that which was held to be outside the ban of § 8(b)(4)(ii)(B) in *Tree Fruits*.

[3] For the same reason, *Hughes* v. *Superior Court*, 339 U.S. 460, the only case which has sustained the constitutionality of a ban

(2) From what is restrained and what is not, it appears that the actual purpose of § 1385(B)(8) is to further the commercial interests of non-union agricultural employers who wish to sell under a trade mark, trade name or generic name their produce jointly with growers who are involved in a labor dispute, or, perhaps, more broadly, to further the interests of all non-union employers not involved in a present "dispute"[4] with their employees.

As the court below recognized, *A. F. of L.* v. *Swing,* 312 U.S. 321, 325-326, squarely holds that the broader of these purposes is not a justification for the restraint imposed:

> That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiotmatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all

against consumer picketing, does not bear on the present case. Additionally, *Hughes* was decided on the premise that the picketing was engaged in to compel a store owner to engage in racially selective hiring contrary to the legal policy of the State. (See 339 U.S. at 463, 466-469.) Whether *Hughes* was rightly decided on its facts, and whether picketing addressed to consumers may be equated for constitutional purposes with union picketing as a signal to union members are questions properly left for consideration in a case in which consumer picketing is the focus of the challenged regulation.

[4] See § 1382.6 of the Arizona Act defining "dispute" discussed in 449 F.Supp at 463.

> engaged in the same industry has become a commonplace. *American Steel Foundries* v. *Tri-City Council,* 257 U.S. 184, 209. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case.

See also *Cafeteria Union* v. *Angelos,* 320 U.S. 293, 295-296.

And, we submit, that the line of authority beginning in *Virginia Pharmacy Bd.* v. *Va. Consumer Council,* 425 U.S. 748, forecloses the State from pursuing the narrower purpose by stemming the free flow of information to the public. The Court there began:

> Our question is whether speech which does "no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U.S. at 385, is so removed from any "exposition of ideas," *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942), and from "'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,'" *Roth* v. *United States,* 354 U.S. 476, 484 (1957), that it lacks all protection. Our answer is that it is not. [425 U.S. at 762.]

After summarizing the "substantial individual and societal interests" (*id.* at 766) in the free flow of price information (see *id.* at 762-765), the Court surveyed the "justifications for the [price] advertising ban [at issue which] have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists" (*id.* at 766; see *id.* at 766-768). Those justifications were found to be constitutionally insufficient because:

[O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. * * *

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. [425 U.S. at 769-770.]

As the Court was quick to add "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. Cf. *Parker* v. *Brown,* 317 U.S. 341 (1943)." (425 U.S. at 770.) Thus, while the State can prohibit price competition, it cannot permit businessmen an option between a low-price, limited-service policy or a high-price, full-service policy, recognize the consumer's freedom to choose between the two, and then attempt to further the interests of those who provide full-service at high cost by stemming the free flow of price information to consumers. However else the State may regulate commercial conduct, it may not do so by regulating free speech in order to insulate from the public's informed judgment the class of businessmen who selects the option favored by the State.

Indeed, as the Court recognized in *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, the First Amendment does not "permit a municipality to prohibit the posting 'For Sale' or 'Sold' signs when the municipality acts to stem what it perceives as the flight of white homeowners from a racially integrated community" (*id.* at 86) although "[t]here can be no question of the importance of achieving [the] goal * * * [of] stable racially integrated housing" (*id.* at 94):

> The Township Council here, like the Virginia Assembly in *Virginia Pharmacy Bd.,* acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as

> the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally." *Virginia Pharmacy Bd.* denies government such sweeping powers. [431 U.S. at 96-97]

See also *Bates* v. *State Bar of Arizona*, 433 U.S. 350. (The "publication in a newspaper of [a lawyer's] truthful advertisement concerning the availability and terms of routine legal services * * * may not be restrained." (*Id.* at 384).)

It follows, we submit, that the State may not suppress attempts to inform the general public that the X-brand of produce is entirely or in part non-union, or is picked entirely or in part by workers receiving less than union wages, or is grown entirely or in part by struck employers, coupled with a request not to buy. Consumers who base their buying decisions on their judgment as to whether the seller's business practices are constructive or anti-social, like consumers who buy on the basis of the price or quality of the product, act entirely within their rights. The premise of *Virginia Pharmacy Bd.* is that since the consumer has a right to choose he has a correlative right protected by the First Amendment to receive information pertinent to that choice. And, the Court there made it plain that this First Amendment right is not overcome by the state's concern that the informed consumer will make a choice that harms the commercial interests of competitors in a free market who exer-

cise the option favored by the State. If the State cannot keep the public ignorant of price information in the interest of the "professional" pharmacist or of the fact that property is for sale to stem the flight of white homeowners from a racially integrated community, it surely cannot do so to facilitate joint marketing efforts by produce growers, some or all of whom are non-union.

For the reason just stated, it is sufficient for present purposes to equate the "speech that does 'no more than propose a commercial transaction' " at issue in *Virginia Pharmacy Bd.* (425 U.S. at 771, n. 24) with appeals not to buy to protest the seller's business policies of social moment. But, the simple commercial offer to sell is entitled to only limited First Amendment protection as the Court, reaffirming *Virginia Pharmacy Bd.*, made clear in *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 455-456:

> We have not discarded the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

In contrast, the right of both management and labor to persuade the *public* to support their side during a labor dispute is entitled to "the same * * * constitutional * * * protection

* * * as any other lawful cause." (*Thomas* v. *Collins*, 323 U.S. at 538.)[5]

That the State here seeks on a basis insufficient to interdict even commercial offers to bar "free discussion concerning the conditions in industry and the causes of labor disputes * * * indispensible * * * to shape the destiny of modern industrial society" (*Thornhill*, 310 U.S. at 103), therefore compels the conclusion that § 1385(B)(8) is unconstitutional.

[5] We underline the word "public" because the Court in *Virginia Pharmacy Bd.* noted the "speech of labor disputants of course, is subject to a number of restrictions" and "expressed no views on [the] complex subject [of the] * * * constitutionality of restrictions upon speech in [that] special context." (425 U.S. at 748, n.17.) A review of the cases since *Thornhill*, suggests that the labor dispute context is "special" for First Amendment purposes only in that it has brought to fore, with particular force and immediacy, two generally applicable principles:

> First, where the State makes certain action unlawful "advocacy * * * directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg* v. *Ohio*, 395 U.S. 444, 447) may be forbidden. Thus, where the State has forbidden concerted refusal to work for certain purposes picketing directed at union members subject to union discipline seeking such refusals may constitutionally be forbidden. (E.g. *Giboney* v. *Empire Storage Co.*, 336 U.S. 490; *Electrical Workers* v. *Labor Board*, 341 U.S. 694.)
>
> Second, it has never been doubted that the First Amendment does not protect threats of reprisal or of force. And, just as the picketing cases show that the government may take cognizance of the particular characteristics of the union-member relationship, so, cases such as *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, show that the government in regulating employer speech may "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear" (*id.* at 617).

Neither of these principles is applicable here.

(3.) Appellants appear to acknowledge (App. Br. 62-64) that § 1385(B)(8) would be unconstitutional if it outlawed untruthful publicity which was not wilfully or recklessly untrue, in other words uttered with "malice" in the sense of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280. The repeated contention that the Arizona courts could construe this provision as containing the *New York Times* standards would be at best disingenuous if the State were later to contend that § 1385(B)(8) is not to be so construed, or that such construction is not necessary to save it.[6]

The proposition is, however, of sufficient general importance that it merits elaboration on our part, particularly since this Court has carved out a category of speech which is protected by the First Amendment but to which the *New York Times* standard does not apply. That, of course, is the area of "speech that does 'no more than propose a commercial transaction'" (*Virginia Pharmacy Bd.*, 425 U.S. at 771,

[6] Appellants urge that the District Court should have abstained from deciding the constitutional issues raised in this case pending possible narrowing construction of the various challenged statutory provisions by the Arizona state courts. We leave to the appellees the demonstration of why that course should be rejected. But, in the event the State's argument prevails, one observation regarding the abstention problem does seem in order.

We submit that where a federal court abstains from deciding a challenge to the constitutionality of a state or local law, it should determine whether the delay inherent in abstention is likely to result in the loss of constitutional rights, and if so, it should protect the plaintiffs (and those on behalf of the suit is brought, if plaintiffs are suing in a representative capacity or if the case has been certified as a class action) against enforcement of the statute during the clarifying state proceeding. The need for such relief is particularly acute where the plaintiffs have raised a substantial claim that the challenged statute is unconstitutionally vague or overbroad; in those situations the uncertainty of the statute's scope restrains the exercise of constitutional rights, and, if the court

n. 24. See also *Bates* v. *State Bar of Arizona*, 433 U.S. at

abstains without protecting the plaintiffs during the pendency of state proceedings, preserves that uncertainty and thus its adverse impact on the exercise of constitutional rights. This is too great a price to pay for the benefit of enabling the state courts to give the statute a limiting and therefore saving construction, particularly since there is an alternative available which protects both the plaintiffs and the state.

Indeed, it was recognized in *Baggett* v. *Bullitt*, 377 U.S. 360, 378-379, that this very effect of vagueness militates against abstention. That decision and many others recognize the high constitutional interest in a prompt determination of whether a particular statute or other governmental direction would entail unconstitutional inference with rights guaranteed by the First Amendment (*Freedman* v. *Maryland*, 380 U.S. 51, 59; *Carroll* v. *Princess Anne*, 393 U.S. 175, 182-184; *Blount* v. *Rizzo*, 400 U.S. 410, 421; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 561-562.) To condition an order delaying further proceeding in the federal case by protecting the plaintiffs for conduct engaged in during the pendency of the state court proceeding protects that constitutional interest while accommodating that of the state in having is own courts construe the statute in the first instance, and that of the federal courts in avoidance of any unnecessary decision of constitutional questions. This is simply an exercise of power and duty of the court of equity to do equity to both sides. (Compare *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528, and cases cited *id.* at 532. *cf. Boys Markets* v. *Retail Clerks*, 398 U.S. 235, 254; *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330.)

As was noted in *Bellotti* v. *Baird*, 428 U.S. 132, a case heavily relied on by appellants, "This Court often has remarked that the equitable practice of abstention is limited by considerations of 'the delay and expense to which application of the abstention doctrine inevitably give rise.' *Lake Carriers' Assn.* v. *MacMullen*, 406 U.S., at 509, quoting *England* v. *Medical Examiners*, 375 U.S. 411, 418." (428 U.S. at 150.) The Court added, "The importance of speed in resolution of the instant litigation is manifest. Each day the statute is in effect, irretrievable events, with substantial personal consequences, occur. Alhough we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis." (*Id.* at 151.) Arizona does not have a certification procedure, but the cost

383.) That distinction rests on the recognition "that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." (425 U.S. at 772, n. 24 continued; 433 U.S. at 383-384.) Such commercial information is more "durable than other kinds" because a speaker who seeks to "disseminate information about a specific product or service that he himself provides * * * presumably knows more about [it] than anyone else" (*id.*), and because, as "advertising is the *sine qua non* of commercial profits, there is therefore little likelihood of its being chilled by proper regulation and forgone entirely" (*id.*). Neither of these considerations pertain to the speech regulated by § 1385(B)(8).

of abstention can be reduced even more greatly by the exercise of the equitable authority to protect the plaintiffs against enforcement of the state statute pending a definitive resoluion of the state law questions by the state courts. This was the course followed by the District Court and approved by this Court in *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167. Mr. Justice Harlan wrote:

> Because of its findings, amply supported by the evidence, that the existence and threatened enforcement of these statutes worked great and immediate irreparable injury on appellees, the District Court's abstention with respect to Chapters 33 and 36 proceeded on the assumption *"that the defendants will continue to cooperate, as they have in the past, in withholding action under the authority of the statutes until a final decision is reached. . . ." 159 F.Supp., at 534. In this Court counsel for the appellants has given similar assurances with respect to the three statutes presently before us, assurances which we understand embrance also the intention of these appellants never to proceed against appellees under any of these enactments with respect to activities engaged in during the full pendency of this litigation. *While there is no reason to suppose that such assurances will not be honored by these or other Virginia officials not parties to this litigation, the District Court of course possesses ample authority in this action, or in such supplemental proceedings as may be initiated, to protect the appellees while this case goes forward.* [360 U.S. at 178-179, emphasis supplied.]

The union that criticizes a producer's labor policies and asks customers not to buy has the same problems of verification as the reporter, the commentor or any other third person.

And even if it is assumed that some disparagement of a product by others is nevertheless entitled to less protection than the *New York Times* standards provide, that further exception would not save § 1385(B)(8) for several reasons: First, although "there is little likelihood of [commercial advertising] being chilled by proper regulation and forgone entirely" (*id.*), this Court has recognized that speech in labor disputes would be chilled if it were subject to a strict test of truth. (*Linn* v. *Plant Guard Workers,* 383 U.S. 53; *Letter Carriers* v. *Austin,* 418 U.S. 264.) To be sure, the Court there adopted the *New York Times* standards "by analogy, rather than under constitutional compulsion" (383 U.S. at 65; 418 U.S. at 272), but those decisions reflect this Court's appreciation of the realities which render speech in labor disputes more vulnerable to sanctions than commercial advertisement and are here relied on solely for that proposition. Second, as we have emphasized, § 1385(B)(8) covers inducements not to buy which provide information of broader social significance than a mere proposal for a commercial transaction. Third, the *Virginia Pharmacy Bd.* exception is addressed to legislation designed to protect consumers against deception. (See 425 U.S. at 771, text preceding note 24.) The defenders of § 1385(B)(8) do not contend that it is even consumer-oriented. Their asserted justification shows that the provision is designed for the protection of producers as a class.[7]

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[7] Most consumers of Arizona produce are, of course, citizens of other States. Cf. *Bigelow* v. *Virginia,* 421 U.S. 809, 822-824.

C. Section 1385(B)(8) suffers from an additional constitutional infirmity in that it is entirely one-sided in its application. Appellants have proffered no justification whatsoever for outlawing publicity which induces the public not to purchase certain products, while imposing no restraints on publicity which induces the public with precisely the opposite language to purchase that product. Producers and those economically or ideologically allied with them remain entirely free to proclaim that they deserve the public's support because of their labor policies, or because of other "socially desirable" behavior. Yet, it is forbidden to urge consumers and retailers not to buy because some or all the produce was grown under substandard labor conditions, or even because the workers were denied their rights under the Arizona labor relations statutes.

It is settled constitutional law that such disparity of treatment must be independently justified even if the justification for the restraint on speech is sufficient to sustain an evenhanded bar. This Court's fullest discussion of that requirement is *Police Department of Chicago* v. *Mosley,* 408 U.S. 92. In striking down a Chicago ordinance which forbade picketing or demonstrations in a public way within 150 feet of any primary or secondary school building (during certain times) but excepting labor picketing from that ban, the Court held:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. * * *

[The Court here cited *Cohen* v. *California*, 403 U.S., 15, 24, and its precursers.]

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas" and government, must afford all points of view an equal opportunity to be heard. • • •

The late Mr. Justice Black, who thought that picketing was not only a method of expressing an idea but also conduct subject to broad state regulation, nevertheless recognized the deficiencies of laws like Chicago's ordinance. This was the thrust of his opinion concurring in *Cox* v. *Louisiana*, 379 U.S. 536 (1965):

> "[B]y specifically permitting picketing for the publication of labor union views [but prohibiting other sorts of picketing], Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Id.*, at 581.

We accept Mr. Justice Black's quoted views. Cf. *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 76 (1964) (Black, J., concurring). [408 U.S. at 95–98, footnote omitted.]

In *Mosley* the Court held that the Chicago ordinance violated the Equal Protection clause of the Fourteenth Amendment, though recognizing that "the Equal Protection claim in this case is closely intertwined with First Amendment interests." (408 U.S. at 95.) Two subsequent cases, which expressly followed *Mosley*, struck down state laws which restricted the presentation of one side of a public question but not another as violative of the First Amendment. In *Madison Sch. Dist.* v. *Wisconsin Emp. Rel. Comm'n.*, 429 U.S. 167, the Court held:

> To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required [by state law] to discriminate between speakers on the basis of their employment, or the content of their speech. See *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). [429 U.S. at 175-176, footnote omitted.]

And, again, last term in *Bellotti, supra*, the Court held:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature's suppression of speech suggests an attempt to give one

side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. [435 U.S. at 784-786, footnotes omitted.]

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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